(33,983)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 674

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, ETC., ET AL., APPELLANTS,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

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[fol. 1] Copy

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 534. In Equity

THE MAUMEE VALLEY ELECTRIC COMPANY, Plaintiff,

vs.

GEORGE F. SCHLESINGER, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, and Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio; The Village of Maumee, Ohio, and The Village of Waterville, Ohio, and The City of Toledo, Ohio, Defendants

BILL OF COMPLAINT—Filed July 29, 1927

1. Plaintiff is a corporation incorporated, organized and existing since prior to the year 1900 as such corporation under the laws of the State of Ohio with its principal office and place of business at the City of Toledo, Ohio, of which city and state it is a citizen residing in the Western Division of the Northern United States Judicial District of Ohio; that it was and is so incorporated, organized and existing for the purpose of generating electricity and supplying the same to the public for light, heat and power purposes and for the purpose of acquiring, owning and holding all property of any and all kinds necessary or proper to be used in conducting said business, including the acquirement and holding of leases and contracts for water to be used in the generation of such electricity through hydro-electric power plants and otherwise; that defendant George F. Schlesinger is the duly appointed, qualified and acting Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio and as such has jurisdiction over, control and manage-

ment of the canals, canal lands and canal waters belonging to the State of Ohio, including the Miami & Erie Canal belonging to said State, as hereinafter referred to, and that under the laws of Ohio it is his duty as such Superintendent of Public Works and Director of the Department of Highways and Public Works to see that all laws of said state pertaining to the management, control and disposition of [fol. 2] the public works of Ohio, including said Miami & Erie Canal and the canal waters thereof, shall be complied with; that defendants Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman are the duly elected, qualified and acting County Commissioners of Lucas County, Ohio; that each of the defendants, Village of Maumee and Village of Waterville and City of Toledo, Ohio, is a municipal corporation incorporated and organized under the laws of the State of Ohio; that defendant George F. Schlesinger is a citizen of Ohio and a resident and inhabitant of the City of Columbus, Ohio, within the jurisdiction of this court, and that each of the other defendants is a citizen of Ohio and a resident and inhabitant of Lucas County, in the Western Division of the Northern United States Judicial District, in said State.

2. The matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) and arises under the Constitution of the United States of America.

3. Plaintiff further says that the State of Ohio, beginning with about the year 1825 under laws passed that year and subsequent thereto, acquired the necessary real estate in fee simple title and provided otherwise for the construction of and constructed and owned in its own right what is known as the Miami & Erie Canal extending from the Ohio River northerly through the City of Cincinnati, Ohio, Dayton and other points northerly to and through the City of Defiance, Ohio, and thence northeasterly from said City of Defiance, Ohio, along or on the Maumee River into and through the City of Toledo, Ohio to Lake Erie; that said canal runs northeasterly from said City of Defiance along the north bank of said Maumee River to a point about twenty (20) miles southwesterly from the Village of Grand Rapids, Ohio; that at said point said canal enters said Mau-

mee River, which river from said point was and is still used as a part of said canal northeasterly to said Village of Grand Rapids, Ohio; that said canal on the north bank of said river at a point opposite said Village of Grand Rapids connects with said river and runs thence northeasterly along the north bank of said river through defendant Villages Waterville and Maumee and from thence on into the City of Toledo as aforesaid; that as a part of the construc-
[fol. 3] tion of said canal and for the purpose of storing water in said river for use in said canal, the State of Ohio, at its own cost and expense, constructed across said river at the Village of Grand Rapids, Ohio, on the south bank of said river northerly to the north bank of said river at a point about one-fourth of one mile northeasterly and down said river from where said canal connects therewith, what is known as the Grand Rapids State Dam; that said dam is about one thousand (1,000) feet long across said river, built of concrete, is ten (10) feet high and stores southwesterly therefrom and up said river a pool of water about one thousand (1,000) feet wide and twenty (20) miles long; that the State of Ohio constructed said canal and said Grand Rapids State Dam under the laws of Ohio, passed as aforesaid, for the purpose of operating or permitting to be operated on said canal canal boats carrying passengers and freight and for the purpose of supplying water for hydraulic purposes and uses in the operation of industrial plants, hydro-electric plants and other industrial enterprises; that said laws, passed by the General Assembly of Ohio in the year 1825 and subsequent years, provided for the location of said route of said Miami & Erie Canal from the Ohio River to Lake Erie and therein authorized the acquirement of the necessary real estate and material and contracts for the construction of said canal and the necessary dams and other equipment for the operation thereof; that under said laws there was created a Board of Canal Commissioners with authority to locate and construct said Miami & Erie Canal and put the same into operation for the purposes of navigation and supplying water for hydraulic power as aforesaid; that said canal was completed and put in operation from the Ohio River northerly and northeasterly as aforesaid to Lake Erie in about the year 1842; that in the year 1828 said Board of Canal Commissioners,

through a law duly passed by the General Assembly, was given power to sell or lease water from said canal whenever in the opinion of the Board any water might be spared from any state canal or works connected therewith without injury to the navigation or safety of such canal, for any term of years in their discretion to any person who should bid the highest annual rent therefor; that in 1830, through [fol. 4] a law duly passed by the General Assembly of Ohio, said Board of Canal Commissioners was given power providing that whenever in the opinion of such Board there should be any water in any state canal, including said Miami & Erie Canal, or passing around locks or stored above any state dam and not necessary for navigation on said canals, said Board might order such water not needed as aforesaid sold or leased for hydraulic purposes, subject to such conditions and reservations as such Board might consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rent or otherwise as said Board might deem most beneficial for the interests of the State, said law further providing that every lease, grant or conveyance of water power made under said law should contain a reservation and condition that the State of Ohio might resume the privilege or right to the use of such water sold or leased as aforesaid, or any portion thereof, whenever it might be deemed necessary for the purposes of navigation or whenever the use of such water for hydraulic purposes should be found to interfere with and injuriously affect navigation on the canal from which such water should be taken for hydraulic purposes, and said law further provided that whenever such privilege should be resumed in whole or in part, the sum paid therefor or the rent reserved, or such reasonable portion thereof as might be determined upon agreeably to the conditions and stipulations of the lease aforesaid, should be refunded or remitted to the lessee; and plaintiff says that said law remained in force without change to the year 1917 when it was modified or amended by the General Assembly of Ohio only in that said amendment provided that from the taking effect thereof leases of water from said canals should not be made for a longer term than twenty-five (25) years.

Plaintiff further says that said canal has been completed and in operation for a period of about eighty-five (85)

years and was operated through a portion of that time since its completion, namely to about 1894, for the purpose of navigation thereon by various kinds of canal boats; that prior to said year of 1894 navigation on said canal had [fol. 5] almost disappeared because of failure or refusal of the public to use the same for such purpose and that between the years 1894 and 1900 navigation on said canal entirely ceased as a business for the reasons aforesaid and it has not since been revived.

Plaintiff further says that contemporaneously with the construction of said canal and subsequent thereto the General Assembly of Ohio passed laws commanding and directing the Board of Canal Commissioners, which Board of Canal Commissioners in about the year 1840 was designated through a law passed by the General Assembly as the Board of Public Works, to acquire lands along the line of said canal wherever hydraulic power might be developed, including that part of said canal lying northeasterly from and including the Grand Rapids State Dam, and the General Assembly appropriated and there were expended for such purposes large amounts of money through which hydraulic power was developed at many points on said canal and during said time the General Assembly of Ohio directed said Canal Commissioners and the Board of Public Works to sell any lands not needed belonging to the State along said canal and theretofore acquired except lands at points where hydraulic power might be developed by the State.

4. Plaintiff further says that throughout the time since the completion of said canal as aforesaid it has been continuously operated between and including the cities of Cincinnati and Toledo for the purpose of supplying water for hydraulic power to industrial plants, hydro-electric plants and other industrial purposes, and throughout said time the State of Ohio has entered into a great number of leasing contracts and other contracts granting unto persons, firms and corporations the right to take water from said canal and providing for the payment of rentals in money in such amounts as should be stipulated for such users to pay to the State of Ohio from time to time throughout the rental periods called for in such leases respectively; that the State of Ohio throughout said time has operated said canal,

including that portion thereof lying northeasterly from the Grand Rapids State Dam as aforesaid, as a business of the State and in the aggregate it has realized a great amount of income therefrom.

[fol. 6] Plaintiff further says that relying upon said laws and the constant and continued practice followed by the State of Ohio in granting leases of water from said canal as aforesaid, plaintiff, in the year 1900, became and still is the owner of a lease theretofore granted by the State of Ohio on March 12, 1895, to Robert J. Law, Trustee, wherein it is provided that for a period of thirty (30) years from March 12, 1895, said lessee, his successors and assigns should be entitled to all the water not needed for navigation and not under lease to other parties flowing in said Miami and Erie Canal between the point where said canal connects with the Maumee River above said State Dam as aforesaid and the City of Toledo, said water to be taken out of said canal at said Village of Maumee, Ohio, and be conveyed to the mills or other hydraulic works to be constructed by and at the expense of the lessee; that said lease provided that said lessee, his successors and assigns should pay to the State of Ohio for such water the sum of Five Hundred Dollars ($500.00) per annum; that said rentals have always been paid by plaintiff since its purchase and acquirement of said lease, which purchase and acquirement were made by and with the consent of the State of Ohio; that said lease by its terms provides as a part thereof and as a part of the consideration thereof aforesaid that at the expiration of said lease the lessee or his assigns should be entitled to and should have a renewal of said lease for a like term of thirty years (30) for such annual rental as might be offered by the highest responsible bidder who should also agree to purchase of said lessee or his assigns all permanent and valuable buildings necessarily erected by said lessee for the convenient use of the water power granted and leased as aforesaid, at such price as such buildings might be adjudged to be worth by three (3) judicious disinterested freeholders to be chosen as specified in the lease; but it was and is provided in said lease as a part thereof and as a part of the consideration therefor that if no such bid should be made by any outside person on the terms aforesaid at a higher rate than said rate in said lease specified, then said [fol. 7] original lessee or his assigns should have a renewal

of such lease under all the terms thereof as originally made and for a period of thirty (30) years from March 12, 1925; that plaintiff duly elected to take a renewal of said lease as aforesaid and duly notified the State of Ohio prior to the expiration of said first thirty (30) years of its said election and it duly made application at that time to said State of Ohio for such renewal; that no bid whatever was or has been received by the State of Ohio for such lease and that under the terms thereof as aforesaid said renewal of said lease has become and is now vested in plaintiff for said renewal period of thirty (30) years from March 12, 1925.

Said lease further provides that said lessee and his assigns during the continuance thereof shall, at his or their own expense, keep constantly in good order and repair all the banks and all works and devices of every kind connected with said canal or constituting the same throughout the length of said canal from where it joins the Maumee River above said dam northeasterly to a point north of the point in defendant Village of Maumee where the water granted by the lease is to be used, this covering a distance of about eighteen (18) miles and being known as the eighteen mile level of said canal; that lessee or his assigns at his or their own expense should prevent any breach in the banks of said canal or the formation of any bars or other injury to said canal, and it provides that if lessee or his assigns should fail to do any of the things thus provided for them to do, then the State of Ohio could make such repairs and do any and all other things necessary to restore said canal to and keep it in good condition and when the State should perform such service, lessee or his assigns would be compelled to repay to the State of Ohio all the moneys expended by it in that behalf. Plaintiff further says that it has at all times, since the acquirement by it of said lease, complied with all the terms and conditions thereof and especially it has continually kept said canal and all said parts thereof in good order and repair at its own cost and expense and without any expense whatever to the State of Ohio.

[fol. 8] Said lease further granted to said lessee and his assigns the use, during the continuance of said lease, of a certain parcel of land beginning at the easterly side of River Tract No. 22 in the 12 mile square reserve at the foot of the rapids of Lake Erie in the south margin of the

Miami & Erie Canal at the water edge at any point between the west line of Farrer Street and the east line of Wolcott's Basin in Wolcott's Addition to Maumee and running from thence southerly along and near the west line of Farrer Street to the Maumee River on the bank and along the margin thereof on River Tracts Nos. 21 or 22, by said lease giving, granting and conveying unto said lessee or his assigns all the land in one or both of said River Tracts Nos. 21 and 22 sufficient for all the necessary use and occupation of a water power to enable said lessee or his assigns to use and enjoy said water power throughout the duration of said lease.

5. Plainiff further says that on the acquirement of said lease as aforesaid for carrying on its business of generating electricity for light, heat and power purposes by water power, it acquired a valuable piece of land at Farrer Street in said Village of Maumee on the northerly bank of said Maumee River but southerly and about three hundred (300) feet from the southerly bank of said canal; that there at great expense it erected a hydro-electric plant and installed therein the necessary turbine water wheels and necessary machinery, electrical and otherwise, required for the generation of electricity to be supplied to the public for light, heat and power purposes, said hydro-electric plant to be operated by water power through and by means of said water leased and called for by said lease and to be furnished by the State of Ohio to plaintiff under the terms of said lease; that said Miami & Erie Canal extends and continues from the northerly end of said eighteen mile level on northeasterly a distance of about seven and one-half (7½) miles to its outlet lock and the outlet of said canal into Swan Creek in the City of Toledo, Ohio; that between said hydro-electric plant and said canal at said Farrer Street in Maumee, Ohio, plaintiff constructed at great expense a large water flume [fol. 9] through which and by means of which the water called for by said lease to be furnished to plaintiff by the State of Ohio was, has been and is conveyed southerly to the northerly bank of said Maumee River to a point above said hydro-electric plant and the turbine water wheels thereof at which point said water falls from the surface level of said canal down to the plant's said turbine wheels a distance of approximately sixty-two (62) feet.

6. Plaintiff further says that in the year 1902 the General Assembly of the State of Ohio duly passed an act, which took effect in the month of April that year, through which it was enacted that:

"It is hereby declared as the settled policy of this State that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, shall be retained and maintained as a public canal; also that the same policy is hereby declared as to the northern division of the Ohio Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cleveland to Dresden on the Muskingum River, in Ohio."

7. Relying upon this policy declared by the State of Ohio as aforesaid and upon the long established policy, custom and constant practice followed by the State of Ohio since the construction of said canal in granting leases of water from said canal to water users for hydraulic, hydro-electric and other industrial purposes, as aforesaid, plaintiff, with the consent and approval of the State of Ohio, given through resolutions duly passed by its Board of Public Works, purchased and became and still is the owner of four (4) other leases of water to be delivered to plaintiff at Maumee, Ohio, for the operation of said hydro-electric plant, and plaintiff also on November 10, 1910 entered into a lease and agreement supplementary to said Robert J. Law, Trustee, lease above described, the dates on which plaintiff acquired said four leases and the terms and provisions of said four leases and said supplementary lease being as follows:

A. A water power lease originally granted by the State of Ohio to A. C. Tryon, dated April 8, 1903, for a term of thirty (30) years from the 1st day of May, 1903, and calling for 2,050 cubic feet of water per minute to be taken from the Miami & Erie Canal at Maumee, Ohio, on the payment [fol. 10] by Tryon or his assigns of Three Hundred Dollars ($300.00) Annually to the State of Ohio, which lease expires on the 1st day of May, 1933, and furnishes water to the extent of 58 horse power. This lease was acquired by plaintiff as aforesaid on October 13, 1904.

B. A water power lease originally granted by the State of Ohio to George K. Detwiler for a term of thirty (30) years from the 1st day of May, 1901, dated February 20, 1901, and calling for 833 cubic feet of water per minute to be taken from said canal at Maumee, Ohio, upon the payment by Detwiler or his assigns of the sum of Three Hundred Twenty Dollars ($320.00) annually, which lease expires on the 1st day of May, 1931, and furnishes water to the extent of 50 horse power. This lease was acquired by plaintiff on September 20, 1909.

C. In and by said supplementary lease above mentioned, it is provided that plaintiff should at its own expense remove the rock bars in said Miami & Erie Canal from the Grand Rapids State Dam at Grand Rapids and Providence, Ohio, northerly a distance of eighteen (18) miles to Lock No. 45 in said canal, being said eighteen mile level thereof, which Lock No. 45 is about one (1) mile north of said hydro-electric plant; that plaintiff throughout said distance should remove other obstructions, if any, in said canal and should excavate said canal to a greater depth and width so that an increased amount of water might be carried through the same throughout said distance and to the safe capacity of said canal. Said supplementary agreement further provides that upon the completion of said work just described plaintiff should pay a largely increased rental to the State of Ohio over what it was paying as aforesaid under said Robert J. Law lease, namely, an increased amount of Fifteen Hundred Dollars ($1,500.00) per annum in any and all events, and it provides that plaintiff should in addition to the above rentals pay to the State the sum of Three Hundred Seventy-five Dollars ($375.00) per quarter beginning on the 10th day of April, 1911 for each three months of continuous hydraulic service rendered by the State to the Company under the terms of said Law lease and supplementary agreement during which time a flow of water to the [fol. 11] depth of six (6) inches over the top of the Company's weirs should be maintained without interruption continuing longer than six (6) consecutive hours; that the State of Ohio would let into said eighteen mile level of said canal at Grand Rapids from the pool above said dam, water of Maumee River equal to the safe capacity of said

canal, for use for hydraulic purposes at said hydro-electric plant located near Maumee, and cause a large, steady and even flow of such water as might be practicable except in cases of unavoidable accident or public necessity, all consistent with the rights of navigation on said canal; that under this lease as well as said Robert J. Law lease plaintiff should also bear the cost and expense of keeping the banks of said canal and all parts of the same in good repair throughout said distance from said State Dam to said Lock No. 45; that the State would require its Superintendent of Canals to appoint three (3) patrolmen who should be paid for their services by plaintiff and who should patrol said canal banks between Grand Rapids and said Lock No. 45 to repair breaks in canal banks, stop leaks, remove logs, brush and other impediments to free and even flow of water; that the State sells and leases unto plaintiff all the increased flow of water provided for by said supplementary agreement; that plaintiff should maintain its weir at such level as said Board of Public Works might require; that plaintiff should complete excavation of said rock bars near Waterville, Ohio, as well as remove all other obstructions in said canal on said eighteen mile level and raise the banks thereof with all possible diligence at the sole expense of plaintiff; that said lease is supplementary to said Law lease and was granted for the purposes of enabling the State to give satisfactory and adequate service to plaintiff and to increase the flow of water in said canal between said State Dam and said hydro-electric plant and to increase the revenues to the State of Ohio through said lease.

Plaintiff says that immediately after the execution of said lease it proceeded with said removal of said rock bars and said excavation, deepening and widening said canal, and completed the same in the year 1911 at a cost and expense to plaintiff of Fifty three Thousand Dollars ($53,-[fol. 12] 000.00).

D. A water power lease originally granted by the State of Ohio to the Maumee Paper Company, for a term of thirty (30) years from May 1, 1903, dated April 8, 1903 and calling for 2,050 cubic feet of water per minute to be taken from the Miami & Erie Canal at Maumee, Ohio, upon the payment of rental to said State by said Company or its assigns

of Four Hundred Dollars ($400.00) per annum, which lease expires on the 1st day of May, 1933, and furnishes water to the extent of 52 horse power. This lease was acquired by plaintiff in the year 1912.

E. A water power lease originally granted by the State of Ohio to Thomas W. Studer, for a term of thirty (30) years from the 1st day of November, 1906, dated November 13, 1906, and calling for 2,100 cubic feet of water per minute to be taken from said canal at Maumee, Ohio, upon the payment of rental to said State by said Studer or his assigns of Four Hundred Fifty Dollars ($450.00) annually, which lease expires on November 1, 1936 and furnishes water to the extent of 47 horse power. Plaintiff acquired this lease on December 11, 1913.

8. Except as hereinabove set forth, each of said leases described in sub-paragraphs A, B, D and E contains provisions, terms and conditions the same as the terms and conditions of said Robert J. Law, Trustee, lease, including provisions for the renewal of each of them respectively as contained in said Law lease, and including provisions requiring the lessee or his assigns to keep all parts of said canal in repair at his or their own cost and expense.

Plaintiff further says that at the time it elected to take a renewal of said Robert J. Law, Trustee, lease, as above stated, it also elected to take a renewal of each of said other leases, including said supplementary lease, and at the time filed application with the State of Ohio through its Department of Public Works for such renewal on the terms of each of said leases respectively. Said supplementary lease was renewed with said Law lease.

Plaintiff further says that it has at all times paid and is still paying the rentals to the State of Ohio in accordance [fol. 13] with each and all of said leases hereinabove described, and that it has in all respects fully complied with all the terms and conditions required of it to be complied with in said leases and it has fully done and performed all things required of it by said leases respectively to be done and performed, including the up-keep, maintenance repair and improvement of said canal and all equipment and facilities connected therewith and used in the operation of the

same, from the point where said canal connects with said Maumee River above said Grand Rapids State Dam northeasterly to said Lock No. 45, throughout said eighteen mile level, and plaintiff says that this has been done free of all cost and expense to the State of Ohio, in accordance with said leases, and that it is ready, willing and able to continue and will continue to the end of its said leases, including renewals thereof, to maintain said portion of said canal and parts thereof free of costs and expense to the State of Ohio.

9. Plaintiff further says that when said hydo-electric plant was first constructed, as aforesaid, it was of small capacity, namely, about 400 horse power, but that relying upon the long established policy, custom and constant practice followed by the State of Ohio in granting leases of water from said canals to water users for hydraulic, hydo-electric and other industrial purposes, as described above herein, and relying upon the declaration by the State of Ohio that the said Miami & Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo should be retained and maintained as a public canal and this even though it was known by the State and the public that navigation on said canals could not be revived, plaintiff greatly increased the capacity of said hydro-electric plant as aforesaid, in that it greatly enlarged the building thereof on the northerly bank of the Maumee River, removed the small turbine wheel therein first installed and then installed in said plant three large, modern turbine water wheels of latest pattern and with a total capacity of about 2,600 horse power, installed all necessary dynamos and other electrical machinery and appliances, together with a small auxiliary steam plant, which auxiliary plant was installed and maintained for the purpose of assisting the water plant in generating electricity [fol. 14] when through dry seasons of the year it should not be possible to obtain water to run said water wheels to their capacity; that all this cost and expense was incurred and this plant was built to its present capacity and completion prior to the year 1915 and throughout all said time said pla-t has been operated and is still being operated with said water power under said leases in the generation of

electricity, which has been throughout said time and still is being sold to the public for light, heat and power purposes; that said hydro-electric plant, including the land, buildings and equipment thereon, is of a value of not less than Three Hundred Thousand Dollars ($300,000.00) used in connection with said water rights and that said leases and the water rights secured thereunder are of very great value, namely, a minimum value of Four Hundred Fifty Thousand Dollars ($450,000.00) and this is so partly because of the fact that through them power is furnished at a cost and expense in the generation of electricity far below what the cost and expense is or would be in the generation of such electricity through the means of steam plants by the use of coal; that the cost and expense in the up-keep and operation of said plant in the generation of electricity is constant and not subject to all the varying changes and increases of prices in the cost of coal, in the depreciation of machinery operated through the means of coal in furnishing power in said business; and plaintiff says that there is no other source of water supply available for the operation of said hydro-electric plant aside from the water obtained through said leases from the State of Ohio as aforesaid.

10. There are no other leases aside from those described above owned by plaintiff, leasing water on said eighteen mile level of said canal, and there is only one other lease granting water from said canal north of said eighteen mile level to the outlet of said canal in Swan Creek, which other lease is a renewal of one granted prior to March 12, 1895 and it grants to the Toledo Grain and Milling Company the right to take water out of the north end of said canal to the amount of 4,800 cubic feet per minute for operation of a large flouring mill belonging to said the Toledo Grain and Milling Company.

[fol. 15] 11. Plaintiff further says that on January 22, 1920, the General Assembly of Ohio passed an Act approved by the Governor of Ohio upon February 4, 1920, providing for the abandonment and sale of that part of said Miami & Erie Canal to the City of Toledo, Ohio, beginning at the outlet lock of said canal at said Swan Creek in said City of Toledo and extending westerly, including the entire width

of said canal lands a distance of 8.87 miles to a point 1.6 miles south of said water flume and hydro-electric plant and just north of the outlet lock to the Maumee side-cut so-called, leading from the said canal easterly to the Maumee River and belonging to said State of Ohio. Said Act is found in Volume 108, Part 2, Ohio Laws, pages 1138 to 1141 inclusive, and provides that upon the passage of said Act, the Governor of Ohio should appoint two disinterested freeholders of Ohio who, in conjunction with the Superintendent of Public Works of Ohio should proceed to appraise said portion of said canal thus to be sold; that said appraisers should file in writing certified copies of their appraisement when made with the Governor of Ohio and the Mayor of said City of Toledo; that said City of Toledo should have an option of either leasing or purchasing said 8.87 miles of said canal, providing the City Council of said City should within three (3) years after said appraisement signify by resolution its acceptance of such appraisement and its intention either to purchase or lease said portion of said canal in accordance with the terms of said Act; that said Act provided said portion of said canal could be purchased by said City of Toledo at its election, but that there should be excepted from said purchase and said purchase should and could only be made subject to the rights of owners of then existing leases from the State of Ohio of either lands or waters or both, and the rights of said owners to a renewal of said existing leases respectively and that when said City of Toledo should pay the purchase price for said portion of said canal, as fixed by said appraisers, the Governor was authorized by the Act to execute a deed conveying said property to said City of Toledo, but expressly excepting therefrom and subeject to the rights of owners of [fol. 16] existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing leases respectively, said leases hereinabove mentioned and referred to being the only leases in force at the time of or since the passage of said Act.

Said Act further provides that in case the lessees of the State of Ohio are at any time under the terms of said Act, deprived by the City of Toledo of their water rights and privileges, the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which they would

have been entitled under said leases and a renewal thereof respectively and that in case the amount of compensation cannot mutually be agreed upon by said City of Toledo and said lessees respectively, the City of Toledo shall proceed under the provisions of the General Code to condemn such rights of such lessees for the use of said municipality.

12. Plaintiff further says that the Governor of Ohio appointed said appraisers in pursuance of said Act and that said appraisers proceeded to make an inspection survey of said property; that plaintiff notified said appraisers at that time of all the facts with respect to plaintiff's water rights and privileges under its leases and the terms and conditions thereof, as hereinabove set forth and described, and that said appraisers thereafter appraised said property as subject to and encumbered by plaintiff's said rights and leases and said terms and conditions thereof at a price of Three Hundred Thousand Dollars ($300,000.00); that said appraisers thereafter filed their report in writing with the Governor of Ohio and the Mayor of said City of Toledo, showing said appraisal as aforesaid, and plaintiff thereupon notified said City of Toledo of its rights as hereinabove described under said leases; and plaintiff says that defendant, the City of Toledo, has at all times since long before the passage of said legislature act been fully aware of plaintiff's said water rights and privileges under said leases and with all of said business and property carried on, maintained and operated under and in connection with said leases and through said water rights, privileges and powers held under [fol. 17] said leases from the State of Ohio and said City of Toledo, has at all times been fully apprised of and acquainted with all the other facts and circumstances hereinabove set forth.

13. Plaintiff further says that notwithstanding said notification to said City and its knowledge of plaintiff's rights, as above set forth, said City of Toledo thereafter through its City Council and Mayor duly adopted, on September 11, 1922, a resolution approving said appraisal in the sum of Three Hundred Thousand Dollars ($300,000.00) declaring the intention of said City to purchase and acquire by deed from the State of Ohio in accordance with the terms of said Act said abondened portion of said canal as set forth

in said Act, and specifically directed the City Clerk of said City to file with the Governor of Ohio a certified copy of said resolution as notice of acceptance by said City of said appraisement and of its intention to purchase said abandoned portion of said canal as aforesaid; that thereafter said certified copy of said resolution was filed with the Governor of Ohio, said City of Toledo paid to said State Three Hundred Thousand Dollars, ($300,000.00) and received from said state a deed from the Governor deeding said property to the City of Toledo, but expressly in said deed providing that said deed was made granting said lands to said City, excepting therefrom and subject to the rights of the State's lessees, being this plaintiff and said the Toledo Grain and Milling Company, under their said leases respectively, and the rights of this plaintiff and said Milling Company to said renewal of said leases. Said deed was executed by the State of Ohio through the Governor thereof, as provided in said Act, and was delivered to the City of Toledo upon payment of said purchase price on December 28, 1922.

14. Plaintiff further says that subsequently to the execution and delivery of said deed, as aforesaid, plaintiff had a long controversy with said City of Toledo as to the right of plaintiff to compensation under its said leases and said legislative act and deed, said City of Toledo claiming and insisting that notwithstanding plaintiff's said leases and the provisions of said legislative act and said deed, as [fol. 18] hereinabove set out, plaintiff was not entitled to any compensation for the loss of its water privileges called for by said leases and protected by the provisions of said legislative act and deed as aforesaid; that thereafter in the latter part of the year 1924 and the forepart of the year 1925 said City of Toledo threatened to fill up said canal at the southerly end of that part thereof purchased by said City as aforesaid and south of said hydro-electric plant and thus cut off the water from flowing in said canal to and into said plant; that thereafter through a decree entered by the United States Circuit Court of Appeals for the Sixth Circuit in a suit instituted by plaintiff seeking an injunction against said City of Toledo and appealed to said United States Circuit Court of Appeals, said United States Circuit

Court of Appeals directed the District Court for the Northern Judicial District of Ohio, Western Division, to enter a decree against said City of Toledo, its officers, agents, appointees and employees enjoining them from doing any act or thing to prevent and from preventing in any wise the flow of the water in said canal property purchased by said City of Toledo, as aforesaid, to said hydro-electric plant, until said City of Toledo should pay plaintiff a fair compensation, fixed by mutual agreement, for the water to which it would be entitled under its said leases and a renewal thereof, or fixed by condemnation proceedings under the General Code of Ohio if a mutual agreement as to such compensation could not be reached, said United States Circuit Court of Appeals holding that under and in pursuance of said Act of the General Assembly of Ohio passed January 22, 1920 the acceptance of the terms and provisions thereof by the City of Toledo, with the payment of said purchase price and the delivery of said deed with its said terms and conditions set out as aforesaid, the State of Ohio and said City of Toledo had entered into a contract for the benefit of plaintiff providing that plaintiff should not and would not be deprived of its said water rights and privileges under the terms of said legislative act until said City of Toledo should have paid plaintiff therefor as aforesaid.

[fol. 19] Plaintiff further says that said City of Toledo desires to take the water out of said canal, but has continually refused and still refuses to pay plaintiff any compensation for the loss of the water and water privileges to which it is entitled under its said leases. On the contrary, plaintiff says that said City of Toledo, through its officers, agents and employees, and said defendants, the Commissioners of Lucas County and the Villages of Maumee and Waterville, conspired together and urged the General Assembly of Ohio at the last Session of that Assembly to pass the law hereinafter in the next paragraph of this complaint referred to and described, through which law, if complied with, the water would be taken out of said canal by the defendants in this suit, or some of them, at a point or points south of said property purchased as aforesaid by said City of Toledo and plaintiff would thereby be deprived of the water and water rights and privileges called for by its said leases and this without any compensation therefor,

and said water rights and privileges would be wholly and irreparably injured and destroyed.

15. Plaintiff further says that in pursuance of the action of said City of Toledo and said defendants, the Commissioners of Lucas County, Ohio, and said Villages of Maumee and Waterville, but over the protest of plaintiff and said defendant Schlessinger and his appointees and employees in charge of the Department of Public Works of the State and over the protest and veto of the Governor thereof, the General Assembly of Ohio passed an Act on May 11, 1927 entitled "An act to abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith," said Act being amended Senate Bill No. 48, and which will become effective and be in force on August 10, 1927. Said Act provides that the portion of said canal in Lucas County, Ohio, commencing at a point just below the head of the Maumee side-cut so-called, near Maumee, Ohio, and running thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's sur-
[fol. 20] vey to a point where said canal joins with the Maumee River on the northwesterly side thereof in Providence Township, Lucas County, Ohio, and above said Grand Rapids Dam, should be abandoned both for canal and hydraulic purposes. Said Act further provides that all leases heretofore granted to any person, firm or corporation for canal or hydraulic purposes on that part of the Miami and Erie Canal described as aforesaid, shall become and be null and void after sixty (60) days from the taking effect of this Act and said Act authorizes and specifically directs the Director of Highways of the State of Ohio to, and commands that he shall within sixty (60) days from the taking effect of this Act, drain the water out of said abandoned portion of said canal described above herein and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal. Said Act also authorizes the Commissioners of Lucas County and said defendant municipalities to drain the water from said abandoned portion of said canal, fill up said canal at points of roads and street crossings over the same and to prevent the water from said Maumee River from flowing into or through said abandoned part of said canal.

Said Act makes no provision whatever for the protection of plaintiff in the enjoyment of its rights and privileges under its said leases nor does it make any provision whatever for compensation to plaintiff in case defendants or any of them, shall drain the water from said canal or prevent in any way the water from flowing into and through said canal to said hydro-electric plant or elsewhere under plaintiff's said leases or otherwise.

Said Act repealed an Act passed by the General Assembly of the State of Ohio on April 17, 1925 which latter Act is found on pages 367 to 370 inclusive of Volume 111 of the Laws of Ohio, and gave to the Board of County Commissioners of Lucas County an option to buy the same property covered by said Act passed at the last Session of said General Assembly, upon an appraisal to be made by two disinterested freeholders appointed by the Governor to act [fol. 21] in that behalf with the Superintendent of Public Works. The Governor appointed said appraisers and they, in conjunction with said Superintendent of Public Works, appraised said property at the sum of Seven Hundred Seventy-five Thousand Dollars, ($775,000.00). Said Act further provided that if said County Commissioners should elect to take said property then before the water could be taken out of said canal, said Commissioners should compensate plaintiff for the loss of its rights and privileges under its said leases, paying it a fair compensation therefor to be arrived at by mutual agreement, and if the amount thereof could not be fixed by mutual agreement, then that said County Commissioners should condemn said rights under the General Code of Ohio for the said County. Said County Commissioners have refused to exercise the option given by the State of Ohio to purchase said property as aforesaid.

16. Plaintiff further says that there is no other place on said Miami and Erie Canal at which it can exercise or avail itself of the rights and privileges granted it under its said leases except on and from said eighteen mile level of said canal, but plaintiff says that if it shall be allowed to avail itself of its rights and privileges granted it under said leases, it will be able to use them throughout the time said leases have yet to run respectively and throughout any renewals thereof, at said point where said rights and privi-

leges are now being enjoyed and that thereunder plaintiff will realize great financial benefit and profit therefrom; that notwithstanding that fact and notwithstanding the long time yet to run of plaintiff's said leases hereinabove described, entitling it to take water from said canal, as provided for therein, during the life of said leases and during the life of *said leases and during the life of* a renewal thereof respectively, and notwithstanding that the State of Ohio under said Act of January 22, 1920 entered into said contract with the City of Toledo for the benefit of plaintiff, providing that if the water should be taken out of said canal and plaintiff should be deprived of its water privileges because thereof, plaintiff should be compensated for its [fol. 22] loss in that behalf, as hereinabove stated, nevertheless said General Assembly passed said Act hereinabove described as Senate Bill No. 48, attempting arbitrarily and without making any provision for compensation to be paid to plaintiff for its rights and privileges under its said leases, to declare said leases null, void and of no effect without any fault and not because of any default upon the part of plaintiff in compliance with the terms of said leases, but solely and only for the purpose of confiscating plaintiff's said rights and privileges to the very great damage of plaintiff in the amount of the value of said rights and privileges hereinabove set out; and plaintiff says that said defendant, George F. Schlessinger, Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, in pursuance of the direction and commands of said Act, Senate Bill No. 48, is threatening to and unless restrained by this court, will proceed immediately upon the taking effect of said Act on August 10, 1927, to drain the water out of said eighteen mile level of said canal and prevent any water from flowing therein for the use of plaintiff under its said leases, and thus take away from plaintiff all of said water called for by said leases and totally deprive plaintiff of the same without compensating or paying plaintiff in any wise for its great loss in that behalf and without making any provision in any wise for a continuance of the flow of said water nor any part thereof in said canal for the use of plaintiff; and said other defendants, County Commissioners and the Villages of Maumee and Waterville, are threatening to, and

unless restrained by this court will proceed to fill up said canal as authorized in said Act, Senate Bill No. 48, and thus take away from plaintiff all of said water called for by its said leases and totally deprive plaintiff of the same without compensating plaintiff in any wise for the loss of such water and the rights and privileges with respect to the same granted to it under its said leases and without making any provision in any wise for continuance of the flow of said [fol. 23] water, nor any part thereof, in said canal for the use of plaintiff.

17. Plaintiff further says that if defendants shall be allowed to take such action, as hereinabove described, plaintiff's rights and privileges under said leases of the very great value as hereinabove alleged, will be arbitrarily taken away from it, totally destroyed, ruined and confiscated, and plaintiff will be through such action on the part of defendants, deprived of its property without compensation and without due process of law and wholly in violation of its said leasing contracts and in violation of said contract made in its behalf between said State of Ohio and said City of Toledo, as hereinabove set forth and described, and all this in controvention of and contrary to Section 10 of Article I of the Constitution of the United States as impairing the obligations of each and all of said leasing contracts and said contract made in behalf and for the benefit of plaintiff by the State of Ohio with said City of Toledo, and in controvention of and contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States, as depriving plaintiff of its said property without due process of law, and as denying it the equal protection of the law.

Plaintiff further says that during the year 1911 to and including the year 1925 there was generated through the use of said water power under said leases an average of approximately seven and three-quarter million kilo-watt-hours of electricity per year and during the year 1926 there was generated in the same way something over nine million kilowatt-hours of electricity, all of which throughout said years was sold to the public at prices far below what it could have been sold for had it been generated by means of steam power.

Wherefore plaintiff prays that said defendants, and each of them, and all of their officers, agents, appointees and employees respectively, may be temporarily restrained from draining any part of the water out of any part of said eighteen mile level of said canal and from preventing or in any wise interfering with the entering of water from said [fol. 24] Maumee River into and flowing northeasterly through said canal to said water flume and hydro-electric plant; and from in any wise by any means obstructing the flow of said water in any part of said canal which would prevent the same from flowing to said water flume and said hydro-electric plant; that said temporary restraining order may remain in force until the hearing and determination of plaintiff's application herein made for an interlocutory injunction against defendants enjoining them as herein prayed; and plaintiff hereby applies and prays for an interlocutory injunction against each of said defendants, enjoining them respectively to the same extent and in the same manner as hereinabove prayed for as to said temporary restraining order, and plaintiff prays that upon final hearing said injunction may be made perpetual, and it prays for all proper and equitable relief.

Henderson & Burr, U. G. Denman, Solicitors for Plaintiff.

Duly sworn to by Frank E. Miller. Jurat omitted in printing.

[fol. 25] In United States District Court

[Title omitted]

Præcipe for Summons

To the Clerk of said Court:

Please issue subpœna for the defendant, George F. Schlesinger as Superintendent of Public Works and Director of the Department of Highways and Public Works of Ohio, residing in Columbus, Franklin County, Ohio, and issue duplicate writs to the defendants Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, as County Commissioners of Lucas County, Ohio, and to the Villages of Man-

mee and Waterville and the City of Toledo in said Lucas County, Ohio, said defendant Commissioners and Villages and City being residents of the Northern United States Judicial District of Ohio, Western Division, and with said writs issue copies of temporary restraining order.

Dated July 29th, 1927.

Henderson & Burr, U. G. Denman, Solicitors for Plaintiff.

[fol. 26] In United States District Court

[Title omitted]

Temporary Restraining Order—Filed July 29, 1927

This cause came on for hearing on the application of the plaintiff for a temporary restraining order and it appearing to the court from specific facts shown by the verified bill that immediate and irreparable injury, loss and damage will result to the plaintiff, applicant, before notice can be served and hearing had on this application on the taking effect of an act passed by the General Assembly of Ohio and described in paragraph 15 of the verified bill, that is to say, it appearing from the verified bill that the plaintiff is in the exercise of and operating valuable water rights and privileges under leases from the State of Ohio permitting it to take water from the Miami and Erie Canal at Maumee, Ohio, to operate a hydro-electric plant there situated for the purpose of generating electricity to supply the public with electricity for light, heat and power purposes, and that defendants are claiming the right to fill up said [fol. 27] canal, or shut the water out of the same from the Maumee River at the point where said canal joins said Maumee River above the Grand Rapids State Dam at Grand Rapids, Ohio, or to drain all the water out of said canal at the Maumee side-cut, so-called, and south of said hydro-electric plant, as alleged in the verified bill (either of which last two alternatives could be accomplished within an exceedingly short space of time) and thus shut off the water of said canal from its flow to said hydro-electric plant and thereby prevent the operation of said plant and also prevent the generation of electricity therein and therefrom by

means of said water used in the operation of said plant, and thereby deprive plaintiff of all its water rights and privileges under said leases and wholly destroy the same, and confiscate plaintiff's said property and deprive it of the same without compensation and without due process of law, and it appearing further from said vertified bill that said defendants have threatened and are threatening to proceed and will, unless restrained by this court, proceed to shut off the flow of said water, as aforesaid, with the results aforesaid, and all this without compensating plaintiff in any wise for its said claimed rights and privileges in said water and said canal and without giving plaintiff an opportunity to prove and show its rights and property in said water, as aforesaid, through any court of competent jurisdiction, or other due process of law, and it appearing further from said verified bill that said hydro-electric plant has been constructed at a large cost and expense for the purposes aforesaid, and that said claimed water rights, if valid, are of great value, that if defendants shall proceed to carry out and should carry out their said threats, as aforesaid, plaintiff's said rights will destroyed and great and irreparable injury, damage and loss will come to plaintiff by reason thereof;

[fol. 28] And it appearing that plaintiff is making application for an interlocutory injunction suspending and restraining the enforcement, operation and execution of a Statute of the State of Ohio, by restraining the action of the defendants in the enforcement or execution of such Statute on the claimed ground that said Statute is contrary to and in contravention of the Constitution of the United States;

Now, therefore, it is hereby ordered that, effective as of the effective date of said Act of the General Assembly of Ohio, the defendants and each of them and all of their officers, agents, associations, appointees and employees, respectively, be and they hereby are temporarily restrained from in any way preventing, interrupting, lessening, interfering with or otherwise abridging or injuriously affecting (a) the use by the plaintiff of any and all of the canal water of that portion of the Miami and Erie Canal extending from the State dam and the intake adjacent thereto, located in

the Maumee River immediately south of Grand Rapids, Ohio, to said hydro-electric plant and property located at Maumee, Ohio; (b) the flowage of water from said river into said canal at said dam and intake; (c) from diverting, causing or permitting to be diverted, either into said river or otherwise and either at the said Maumee Side Cut or elsewhere, any of the water of said canal which, without such diversion would and will be available to the plaintiff in said canal at said hydro-electric plant and property; (d) from opening or causing or permitting to be opened, whether wholly or partially, the sluice gate located at or in the Maumee Side Cut in the vicinity of the south corporation line of the municipality of Maumee, Ohio, or any other sluice gate or passage, the opening of which would or will injuriously affect either the volume or flowage of water in said portion of said canal extending between the points first aforesaid; (e) from closing or obstructing, whether wholly or partially, any gate or passage now available or [fol. 29] used for the conveyance of water from said river into said portion of said canal; (f) from constructing or erecting and from causing or permitting to be constructed or erected, any bulkhead, dam or other structure or obstruction the purpose or result of which would be to prevent or lessen the flow of water in any part of said portion of said canal; and from doing, suffering or permitting any other act or thing in any way violative of the rights of the plaintiff secured to it under and by virtue of the leases, agreement and supplementary lease executed by the Board of Public Works of the State of Ohio and now owned by the plaintiff, covering the right to use the waters of said portion of said canal, all until the hearing and determination of the application for an interlocutory injunction, as prayed for in the verified bill, or until the further order of this court. And because of said threats and declarations of defendants that they intend to and will fill said canal, obstruct said flow of water as aforesaid, or drain said water from said canal, and the short space of time within which such threats and declarations could be carried out, this temporary restraining order is granted without notice, this 29th day of July, 1927, at 11:50 A. M.

It is further ordered that this temporary restraining order shall take effect upon the giving by the plaintiff of a

bond in the sum of $5,000.00 executed by sufficient surety to be approved by the Clerk of this Court, conditioned to secure the defendants the damages they may sustain if it be finally decided that said temporary restraining order ought not to have been granted.

And thereupon the plaintiff tendered to the said Clerk of this Court its bond in said sum executed by The Metropolitan Casualty Insurance Company of New York, as surety, and the same was duly approved by the Court.

Benson W. Hough, District Judge.

[fols. 30-32] Bond on injunction for $5,000, approved and filed July 29, 1927, omitted in printing.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TEMPORARY RESTRAINING ORDER—Filed Aug. 19, 1927

This cause came on for hearing on this 19 day of August, 1927, at 10 o'clock A. M. on the application of the plaintiff for an order extending the temporary restraining order heretofore granted herein and effective with the beginning of the 10th day of August, 1927, and for good cause shown, it appearing that under the laws of the United States it is required that the application made by plaintiff in said cause for an interlocutory injunction must be heard by three judges of the United States, as provided in said laws, and that such three judges cannot be called at this time for such hearing, it is ordered that said temporary restraining order heretofore granted herein, as aforesaid, be and the same hereby is extended to and including the 29th day of August, 1927.

Dated this 19 day of August, 1927, at 10 o'clock A. M.

Benson W. Hough, District Judge.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TEMPORARY RESTRAINING ORDER—Filed Aug. 29, 1927

This cause came on for hearing on this 29 day of August, 1927, at 10 o'clock A. M. on the application of the plaintiff for an order extending the temporary restraining order heretofore granted herein and effective with the beginning of the 10th day of August, 1927, and for good cause shown, it appearing that under the laws of the United States it is required that the application made by plaintiff in said cause for an interlocutory injunction must be heard by three judges of the United States, as provided in said laws, and that such three judges cannot be called at this time for such hearing, it is ordered that said temporary restraining order heretofore granted herein, as aforesaid, be and the same hereby is extended to and including the 29th day of August, 1927.

Dated this 29th day of August, 1927, at 10 o'clock A. M.

Benson W. Hough, District Judge.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TEMPORARY RESTRAINING ORDER—Filed Sep. 8, 1927

This cause came on for hearing on this 8th day of August, 1927, at 10 o'clock A. M. on the application of the plaintiff for an order extending the temporary restraining order heretofore granted herein and effective with the beginning of the 10th day of August, 1927, and for good cause shown, it appearing that under the laws of the United States it is required that the application made by plaintiff in said cause for an interlocutory injunction must be heard by three judges of the United States, as provided in said laws, and that such three judges cannot be called at this

time for such hearing, it is ordered that said temporary restraining order heretofore granted herein, as aforesaid, be and the same hereby is extended to and including the 29th day of August, 1927.

Dated this 8 day of August, 1927, at 10 o'clock A. M.

Benson W. Hough, District Judge.

[fol. 36] In United States District Court

[Title omitted]

Order Extending Temporary Restraining Order—Filed Sep. 17, 1927

This cause came on for hearing on this 17th day of August, 1927, at 10 o'clock A. M. on the application of the plaintiff for an order extending the temporary restraining order heretofore granted herein and effective with the beginning of the 10th day of August, 1927, and for good cause shown, it appearing that under the laws of the United States it is required that the application made by plaintiff in said cause for an interlocutory injunction must be heard by three judges of the United States, as provided in said laws, and that such three judges cannot be called at this time for such hearing, it is ordered that said temporary restraining order heretofore granted herein, as aforesaid, be and the same hereby is extended to and including the 29th day of August, 1927.

Dated this 17th day of August, 1927, at 10 o'clock A. M.

Benson W. Hough, District Judge.

[fol. 37] In United States District Court

[Title omitted]

Answer of George F. Schieslinger, as Superintendent of Public Works and Director of Public Highways and Public Works of the State of Ohio—Filed April 14, 1928

Now comes the defendant, George F. Schlesinger, as Superintendent of Public Works and Director of the Depart-

ment of Highways and Public Works of the State of Ohio and for answer to the bill of complaint of the plaintiff, represents as follows:

1. This answering defendant admits the allegations of subdivision 1 of the bill of complaint of the plaintiff herein.

2. This answering defendant admits the allegations of subdivision 2 of the bill of complaint of the plaintiff herein.

3. This answering defendant denies that "The State of Ohio constructed said canal for the purpose of supplying water for hydraulic purposes and uses in the operation of industrial plants, hydro-electric plants and other industrial enterprises"; and further denies that "the laws of the State of Ohio authorized the Board of Canal Commissioners to locate, construct and put in operation the Miami and Erie Canal for the purpose of supplying water for hydraulic power." This answering defendant admits the allegations of subdivision 3 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

[fol. 28] 4. By way of answer to the allegations of subdivision 4 of the bill of complaint of the plaintiff herein, this answering defendant denies the allegation as to the legal effect of the acts of the Legislature therein referred to and the terms of any leases therein referred to, said defendant referring to the terms of said acts and the terms of said leases as to the legal effect thereof, and further denies that "said canal has been operated for the purpose of supplying water for hydraulic power to industrial plants, hydro-electric plants and other industrial purposes"; and further denies that the plaintiff, relying upon the long and constant use and practice followed by the State of Ohio in granting leases of water from said canal as aforesaid, became the owner of the lease therein mentioned, granted by the State of Ohio to Robert J. Law as Trustee, on March 12, 1895; and further denies that "the State of Ohio has realized a great amount of income" from such leases; and further denies that "said lease has become renewed and vests in the plaintiff for the renewal period of thirty years from March 12, 1925." This answering defendant admits the allegations of subdivision 4 of the bill of complaint of

the plaintiff herein except such as are hereinbefore specifically denied.

5. By way of answer to the allegations of subdivision 5, this answering defendant denies the allegation that "on the acquirement of said lease for carrying on its business of generating electricity for light, heat and power purposes by water power, it acquired land as therein alleged"; and further denies that the "hydro-electric plant was erected and installed at great expense"; and further denies that "a large water flume was installed by the plaintiff at great expense." This answering defendant admits the allegations of subdivision 5 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

6. This answering defendant admits the allegations of subdivision 6 of the bill of complaint of the plaintiff herein.

7. By way of answer to the allegations of subdivision 7 of the bill of complaint of the plaintiff herein, this answer-[fol. 39] ing defendant denies the allegation that the plaintiff purchased the four leases therein mentioned, relying upon the policy declared by the State of Ohio, as set forth in the bill of complaint, and upon any policy, custom or practice followed by the State of Ohio in granting leases of water from said canal to water users for hydro-electric or other industrial purposes; and further denies that any of said leases require water to be delivered to the plaintiff at Maumee, Ohio; and further denies the allegations as to the legal effect of the leases therein referred to, this answering defendant referring to the terms of said leases for the provisions thereof; and further denies that the supplementary lease referred to in paragraph "C" of said subdivision of the bill of complaint of the plaintiff herein, was granted for the purpose of enabling the state to give satisfactory and adequate service to the plaintiff and to increase the flow of said canal between said state dam and said hydro-electric plant and to increase the revenue of the State of Ohio from said lease; and further denies that "the plaintiff expended the sum of Fifty-three Thousand Dollars in the removal of rock bars and the excavation, deepening and widening of said canal. This answering defendant admits the allega-

tions of subdivision 7 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

8. By way of answer to the allegations of subdivision 8 of the bill of complaint of the plaintiff herein, this defendant denies the allegation that the plaintiff "elected to take a renewal of said Robert J. Law, Trustee, lease, as above stated" and "also elected to take a renewal of each of said other leases, including said supplementary lease; and that "said supplementary lease was renewed with said Law lease"; and that plaintiff "has in all respects fully complied with all the terms and conditions to be complied with in said leases" and "has fully done and performed all things required of it by said leases respectively to be done and performed." This answering defendant admits the allegations of subdivision 8 of the bill of complaint of the plaintiff herein, except such as are hereinbefore specifically denied.

[fol. 40] 9. By way of answer to the allegations of subdivision 9 of the bill of complaint of the plaintiff herein, this answering defendant denies the allegation that "relying upon the long established policy, custom and constant practice followed by the State of Ohio in granting leases of water from said canal to water users for hydraulic and hydro-electric and other industrial purposes, as described above herein, and relying upon the declaration by the State of Ohio that the said Miami and Erie Canal, together with its water supply, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo should be maintained and retained as a public canal and this even though it was known by the state and the public that navigation on said canal could not be revived, plaintiff greatly increased the capacity of said hydro-electric plant as aforesaid" and further denies that "said hydro-electric plant, including the land, buildings and equipment thereon, is of a value of not less than Three Hundred Thousand Dollars, used in connection with said water rights and that said leases and the water rights secured thereunder are of very great value, namely, a minimum value of Four Hundred Fifty Thousand Dollars." This answering defendant admits the allegations of subdivision 9 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

10. This answering defendant admits the allegations of subdivision 10 of the bill of complaint of the plaintiff herein.

11. This answering defendant admits all of the allegations of subdivision 11 of the bill of complaint of the plaintiff herein except those as to the legal effect of the act of the General Assembly therein referred to, and hereby refers to the terms and conditions of said act as to the legal effect thereof.

12. By way of answer to the allegations of subdivision 12 of the bill of complaint of the plaintiff herein, this answering defendant denies that "plaintiff thereupon notified said city of Toledo as to its rights herein above described under said leases"; and further denies that "the defendant, the City of Toledo has at all times since long before the passage of said legislative act, been fully aware of said water rights and privileges under said leases and with all of said business and property carried on, maintained and operated [fol. 41] under and in connection with said leases and through said water rights, privileges and powers held under said leases from the State of Ohio" and that "said City of Toledo has at all times been fully apprised of and acquainted with all the other facts and circumstances" thereinbefore in said bill of complaint set out. This answering defendant admits the allegations of subdivision 12 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

13. By way of answer to the allegations of subdivision 13, this answering defendant denies the allegations as to the legal effect of the deed therein described and reference is made to said deed as to the legal effect of the terms and provisions thereof. This answering defendant admits the allegations of subdivision 13 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

14. By way of answer to the allegations of subdivision 14 of the bill of complaint of the plaintiff herein, this answering defendant denies the allegations as to the effect of the decision and judgment of the United States Circuit Court of Appeals therein referred to and denies the effect of said

judgment and decision as set forth in said subdivision 14 and refers to said decision and judgment as to the effect thereof; and further denies that the "said City of Toledo, through its officers, agents and empioyes, and said defendants, the commissioners of Lucas County and the Villages of Maumee and Waterville, conspired together "for the purpose of accomplishing any of the things set out in said subdivision 14. This answering defendant admits the allegations of subdivision 14 of the bill of complaint of the plaintiff herein, except those hereinbefore specifically denied.

15. By way of answer to the allegations of subdivision 15 of the bill of complaint of the plaintiff herein, this answering defendant denies the allegation that "in pursuance of the action of said City of Toledo and said defendants, the commissioners of Lucas County, Ohio, and said villages of Maumee and Waterville • • • the General Assembly [fol. 42] of Ohio passed" the act described in said subdivision 15. This answering defendant admits the allegations of subdivision 15 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

16. By way of answer to the allegations of subdivision 16 of the bill of complaint of the plaintiff herein, this answering defendant admits that there is no other place on the Miami and Erie Canal on which plaintiff can exercise or avail itself of the acts and privileges granted to it under said lease except on said eighteen mile level, and admits that the plaintiff will realize financial benefit and profit by the continued use of the water taken from said canal. This answering defendant denies that the plaintiff is longer entitled to take water from said canal; and further denies that by virtue of said act of abandonment of 1927, plaintiff is deprived of any right or privilege; and further denies that plaintiff should be compensated on account of any loss it may sustain by virtue of the provisions of said act; and further denies that there is any confiscation of plaintiff's rights or privileges. This answering defendant admits that the defendant, George F. Schlesinger, Superintendent of Public Works and Director of the Department of Public Highways and Public Works of the State of Ohio, in pur-

suance of the terms of the act referred to in said subdivision of said bill of complaint, is threatening to and unless restrained by this court will immediately drain the water out of said eighteen mile level and prevent water from flowing into said canal, but denies that any such act of said defendant will take away any rights or privileges of the plaintiff. This answering defendant admits the allegations of subdivision 16 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

17. By way of answer to the allegations of subdivision 17 of the bill of complaint of the plaintiff herein, this answering defendant denies the allegation that any rights of the plaintiff will be destroyed, ruined or confiscated by any action to be taken by any of the defendants herein; and further denies that any such action on the part of this de- [fol. 43] fendant will be the taking of any of plaintiff's property without compensation and without due process of law; and further denies that any such taking will be in violation of any of said leases or in violation of any contract between the State of Ohio and the City of Toledo; and further denies that any such action will be in contravention or contrary to section 10 of Article I of the Constitution of the United States, or will impair the obligation of any contract or agreement, or will be in contravention of or contrary to section 1 of Article XIV of the Amendments to the Constitution of the United States; and further denies that any such action will be denying to the plaintiff the equal protection of the law.

Further answering the allegations of said subdivision 17, this answering defendant admits the allegations that the plaintiff has generated by the use of water power obtained by it by water therein, pursuant to the terms of said leases from 1911 to 1925, a large amount of electricity, but denies that said electricity has been sold to the public for less than the price for which it could have been sold had it been generated by steam power. This answering defendant is not advised as to the quantity of electricity which has been manufactured by the plaintiff during said period and therefore denies the allegations thereof. This answering defendant admits the allegations of subdivision 17 of the bill of complaint of the plaintiff herein except such as are hereinbefore specifically denied.

18. This answering defendant says that the Law lease, referred to in subdivision 4 of the Bill of Complaint, the supplementary Law lease, the Tryon lease, and the Maumee Paper Company lease, referred to in subdivision 7 of the Bill of Complaint, provide for the use of water for hydraulic power from points northeast of the portion of said canal abandoned by the 1927 Act of the Ohio General Assembly and are not directly affected by the terms of said Abandonment Act.

19. This answering defendant further says that the plaintiff does not now, and never has since the acquirement of any of said leases, taken any water from that portion of the Miami and Erie Canal abandoned by said Act of 1927, pursuant to said Law lease, supplementary Law lease, [fol. 44] Tryon lease, Detwiler lease, Maumee Paper Company lease, and Thomas W. Studer lease, referred to in the Bill of Complaint. That said plaintiff is using water from said canal at a point approximately three and one-half miles northeast from the portion of said canal abandoned as aforesaid; that the plaintiff's use of the water at such points for hydraulic power is now, and was at all times mentioned in the Bill of Complaint, subject to the rights of the State of Ohio, to the abandonment of the canal at its source, to wit, at Grand Rapids, Ohio.

Wherefore this answering defendant prays that the Bill of Complaint of plaintiff be dismissed at plaintiff's costs.

Edward C. Turner, Attorney General of Ohio. A. M. Calland and J. A. Godown, Solicitors.

Duly sworn to by George P Schlesinger. Jurat omitted in printing.

[fol. 45] In United States District Court

[Title omitted]

Answer of the City of Toledo—Filed Feb. 3, 1928

Now comes the defendant the City of Toledo, a municipal corporation duly organized and existing under the laws of

the State of Ohio, and for answer to the Bill of Complaint of the plaintiff, represents as follows:

1. This answering defendant admits the allegations of subdivision 1.

2. This answering defendant admits the allegations of subdivision 2.

3. By way of answer to the allegations of subdivision 3, this answering defendant denies that, "the State of Ohio constructed said canal for the purpose of supplying water for hydraulic purposes and uses in the operation of industrial plants, hydro-electric plants and other industrial enterprises"; and further denies that "the laws of the State of Ohio authorized the Board of Canal Commissioners to locate, construct and put in operation the Miami and Erie Canal for the purpose of supplying water for hydraulic power." This answering defendant admits the allegations of subdivision 3, except such as are hereinbefore denied.

4. By way of answer to the allegations of subdivision 4, this answering defendant denies the allegations as to the legal effect of acts of the legislature therein referred to and the terms of any leases therein referred to, said de- [fol. 46] fendant referring to the terms of said acts and the terms of said leases as to the legal effect thereof; and further denies that "said canal has been operatel for the purpose of supplying water for hydraulic power to industrial plants, hydro-electric plants and other industrial purposes"; and further denies that "the State of Ohio has entered into a great number of leasing contracts"; and further denies that "the plaintiff, relying upon the laws and constant use and practice followed by the State of Ohio in granting leases of water from said canal, as aforesaid, became the owner of the lease therein mentioned, granted by the State of Ohio to Robert J. Law, Trustee, on March 12, 1895"; and further denies that "the State of Ohio has realized a great amount of income from any such leases"; and further denies that "rentals provided for in said leases have always been paid by plaintiff"; and further denies that "said lease has become renewed and vests in the plaintiff for the renewal period of thirty (30) years from March 12, 1925"; and further denies that "plaintiff

has at all times since the acquirement by it of said lease complied with the terms and conditions thereof and has kept said canal and all parts thereof in good order and repair at its own cost and expense and without any expense to the State of Ohio"; and further denies the allegations contained in the last paragraph of subdivision 4. This answering defendant admits the allegations of subdivision 4, except such as are hereinbefore denied.

5. By way of answer to the allegations of subdivision 5, this answering defendant denies the allegation that "on the acquirement of said lease for carrying on its business of generating electricity for light, heat and power purposes by water power, it acquired land as therein alleged"; and further denies that the "hydro-electric plant was erected and installed at great expense"; and further denies that "a large water flume was installed by the plaintiff at great expense"; and further denies that "there was any water 'called for' by said lease to be furnished to plaintiff by the State of Ohio." This answering defendant admits the allegations of subdivision 5, except such as are hereinfore denied.

6. This answering defendant admits the allegations of subdivision 6.

[fol. 47] 7. By way of answer to the allegations of subdivision 7, this answering defendant denies the allegation that "the plaintiff purchased the four (4) leases therein mentioned, relying upon the policy declared by the State of Ohio, as set forth in the Bill of Complaint, and upon any long established policy, custom or practice followed by the State of Ohio in granting leases of water from said canal to water users for hydro-electric or other industrial purposes"; and further denies that "any leases required water to be delivered to the plaintiff at Maumee, Ohio"; and further denies the allegations as to the legal effect of the leases therein referred to, this answering defendant referring to the terms of said leases for the provisions thereof; and further denies that "the supplementary lease referred to in paragraph marked 'C' of said subdivision was granted for the purpose of enabling the State to give satisfactory and adequate service to the plaintiff and to

increase the flow of said canal between said State Dam and said hydro-electric plant, and to increase the revenues of the State of Ohio from said lease"; and further denies that "the plaintiff expended the sum of Fifty-three Thousand Dollars ($53,000.00) in the removal of rock bars and the excavation, deepening and widening of said canal." This answering defendant admits the allegations of subdivision 7, except such as are hereinbefore denied.

8. By way of answer to the allegations of subdivision 8, this answering defendant denies the allegations that "the plaintiff elected to take a renewal of each of said leases, including said supplementary lease"; and further denies that "the said supplementary lease was renewed with said Law lease"; and further denies that "the plaintiff has paid and is still paying rentals to the State of Ohio in accordance with each and all of said leases"; and further denies that "plaintiff has fully complied with each and all of the terms and conditions and has fully done and performed the things by it to be done and performed by said lease, including the upkeep, maintenance, repair and improvement of said canal and all equipment and facilities connected therewith and used in the operation of the same, from the point where said canal connects with the Maumee River above said Grand Rapids State dam northeasterly to said Lock No. 45." This answering defendant admits [fol. 48] the allegations of subdivision 8, except such as are hereinbefore denied.

9. By way of answer to the allegations of subdivision 9, this answering defendant denies the allegation that "the plaintiff increased the capacity of said hydro-electric plant in reliance upon the long established policy, custom and practice followed by the State of Ohio in granting leases of water from said canal, or in reliance upon the declaration by the State of Ohio that said Miami and Erie Canal and its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo should be retained and maintained as a public canal"; and further denies that "said auxiliary steam plant was installed and has been maintained for the purpose of assisting the water plant in generating electricity"; and further denies that "electricity is being sold to the public for light, heat and power

purposes"; and further denies that "said hydro-electric plant, including the land, building and equipment, is of the value of Three Hundred Thousand Dollars ($300,000.00) or more"; and further denies that "said leases and water rights are of a minimum value of Four Hundred and Fifty Thousand Dollars ($450,000.00)." This answering defendant admits the allegations of subdivision 9, except such as are hereinbefore denied.

10. This answering defendant admits the allegations of subdivision 10.

11. This answering defendant admits all of the allegations of subdivision 11, excepting as to the legal effect of the Act of the General Assembly therein referred to, and hereby refers to the terms and conditions of said Act as to the legal effect thereof.

12. By way of answer to the allegations of subdivision 12, this answering defendant denies that "plaintiff notified the City of Toledo of its rights under said leases" as therein alleged; and further denies that "the defendant the City of Toledo has at all times since the passage of said Act been aware of plaintiff's water rights and privileges." This answering defendant admits the allegations of subdivision 12, except such as are hereinbefore denied.

13. By way of answer to the allegations of subdivision 13, [fol. 49] this answering defendant denies the allegations as to the legal effect of said deed, therein mentioned, and reference is made to said deed as to the legal effect of the terms and provisions thereof. This answering defendant denies that the deed therein referred to provided that the plaintiff and the Milling Company had any rights under said leases to renewals thereof.

14. By way of answer to the allegations of subdivision 14, this answering defendant denies the allegations as to the effect of the decision and judgment of the United States Circuit Court of Appeals, therein referred to, and denies the effect of said decision and judgment as set forth in said subdivision, and refers to the said decision and judgment as to the effect thereof; and further denies that the defendants, "The City of Toledo, Ohio, or the Commissioners of Lucas County, Ohio, or the Villages of Maumee, Ohio, and Water-

ville, Ohio, entered into any conspiracy in relation to the passage of said Act of the General Assembly" as alleged in said subdivision. This answering defendant admits the allegations of subdivision 14, except those hereinbefore denied.

15. By way of answer to the allegations of subdivision 15, this answering defendant denies the allegation that "the Act of the General Assembly therein referred to was passed in pursuance of the action of the defendants, the City of Toledo, the Commissioners of Lucas County, Ohio, and the Villages of Maumee and Waterville, Ohio"; and this answering defendant admits the allegations of subdivision 15, except such as are hereinbefore denied.

16. By way of answer to the allegations of subdivision 16, this answering defendant admits, as alleged in subdivision 16, that there is no other place on the Miami and Erie Canal on which plaintiff can exercise or avail itself of the acts and privileges granted to it under said lease, except on said 18 mile level, and admits that "the plaintiff will realize financial benefit and profit by the continued use of water taken from said canal." This answering defendant denies that "the plaintiff is longer entitled to take water from said canal"; and further denies that "by virtue of said Act of Abandonment of 1927, plaintiff is deprived of any right or privilege"; and further denies that "plaintiff should be [fol. 50] compensated on account of any loss it may sustain by virtue of the provisions of said Act"; and further denies that "there is any confiscation of plaintiff's rights or privileges." This answering defendant admits, as alleged in subdivision 16, that "the defendant George F. Schlesinger, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, in pursuance of the terms of the Act referred to in said subdivision 15, is threatening to, and unless restrained by this Court will, immediately drain the water out of said 18 mile level and prevent water from flowing into said canal," but denies that any such acts of said defendant will take away any rights or privileges of the plaintiff. This answering defendant admits the allegations of subdivision 16, except such as are hereinbefore denied.

17. By way of answer to the allegations of subdivision 17, this answering defendant denies the allegation that "any

rights of the plaintiff will be destroyed, ruined or confiscated by any action to be taken by any of the defendants herein"; and further denies that "any such action on the part of these defendants will be the taking of any of plaintiff's property without compensation and without due process of law"; and further denies that "any such taking will be in violation of any of said leases or in violation of any contract between the State of Ohio and the City of Toledo"; and further denies that "any such action will be incontravention of or contrary to Section 10 of Article I of the Constitution of the United States, or will impair the obligations of any contract or agreement, or will be in contravention of or contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States"; and further denies that "any such action will be depriving the plaintiff of equal protection of the law."

Further answering the allegations of subdivision 17, this answering defendant admits the allegations of subdivision 17 that "the plaintiff has generated by the use of water power obtained by it from water therein, pursuant to the terms of said losses from 1911 to 1925, a large amount of electricity," but denies that "said electricity has been sold to the public for less than prices for which it could have been sold had it been generated by steam power." This answering defendant is not advised as to the quantity of the [fol. 51] electricity which has been manufactured by the plaintiff during said period, as set forth in said subdivision 17. This answering defendant admits the allegations of said subdivision 17, except such as are hereinbefore denied.

18. This answering defendant says that the Law lease, referred to in subdivision 4 of the Bill of Complaint, the supplementary Law lease, the Tryon lease, and the Maumee Paper Company lease, referred to in subdivision 7 of the Bill of Complaint, provide for the use of water for hydraulic power from points northeast of the portion of said canal abandoned by the 1927 Act of the Ohio General Assembly and are not directly affected by the terms of said Abandonment Act.

19. This answering defendant further says that the plaintiff does not now, and never has since the acquirement of any of said leases, taken any water from that portion of the

Miami and Erie Canal abandoned by said Act of 1927, pursuant to said Law lease, supplementary Law lease, Tryon lease, Detwiler lease, Maumee Paper Company lease, and Thomas W. Studer lease, referred to in the Bill of Complaint. That said plaintiff is using water from said canal at a point approximately three and one-half miles northeast from the portion of said canal abandoned as aforesaid; that the plaintiff's use of the water at such points for hydraulic power is now, and was at all times mentioned in the Bill of Complaint, subject to the rights of the State of Ohio, to the abandonment of the canal at its source, to wit, at Grand Rapids, Ohio.

Wherefore, this answering defendant prays that the Bill of Complaint of the plaintiff be dismissed at plaintiff's costs.

Geo. W. Ritter, M. S. Dodd, Solicitors.

[fol. 52] *Duly sworn to by Martin S. Dodd. Jurat omitted in printing.*

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT ANSWER OF THE VILLAGE OF MAUMEE, OHIO, AND THE VILLAGE OF WATERVILLE, OHIO—Filed May 7, 1928

Now come the defendants, the Village of Maumee, Ohio, and the Village of Waterville, Ohio, and representing that they are respectively duly organized and existing under the laws of the State of Ohio, and for their joint answer to the Bill of Complaint of the plaintiff, represent as follows:

1. These answering defendants admit the allegations of subdivision 1.

2. These answering defendants admit the allegations of subdivision 2.

3. By way of answer to the allegations of subdivision 3, these answering defendant deny that "the State of Ohio constructed said canal for the purpose of supplying water for hydraulic purposes and uses in the operation of industrial plants, hydro-electric plants and other industrial en-

terprises"; and further denies that "the law of the State of Ohio authorized the Board of Canal Commissioners to locate, construct and put in operation the Miami and Erie Canal for the purpose of supplying water for hydraulic power." These answering defendants admit the allegations of subdivision 3, except such as are hereinbefore denied.

4. By way of answer to the allegations of subdivision 4, these answering defendants deny the allegations as to the legal effect of acts of the legislature therein referred to and the terms of any leases therein referred to, said defendants referring to the terms of said acts and the terms of said leases as to the legal effect thereof; and further deny that "said canal has been operated for the purpose of supplying water for hydraulic power to industrial plants, hydro elec- [fol. 54] tric plants and other industrial purposes"; and further deny that "the State of Ohio has entered into a great number of leasing contracts"; and further deny that "the plaintiff, relying upon the laws and constant use and practice followed by the State of Ohio in granting leases of water from said canal, as aforesaid, became the owner of the lease therein mentioned, granted by the State of Ohio to Robert J. Law, Trustee, on March 12, 1895"; and further deny that "the State of Ohio has realized a great amount of income from any such leases"; and further deny that "rentals provided for in said leases have always been paid by plaintiff"; and further deny that "said lease has become renewed and vests in the plaintiff for the renewal period of thirty (30) years from March 12, 1925"; and further deny that "plaintiff has at all times since the acquirement by it of said lease complied with the terms and conditions thereof and has kept said canal and all parts thereof in good order and repair at its own cost and expense and without any expense to the State of Ohio"; and further deny the allegations contained in the last paragraph of subdivision 4. These answering defendants admit the allegations of subdivision 4, except such as are hereinbefore denied.

5. By way of answer to the allegations of subdivision 5, these answering defendants deny the allegation that "on the acquirement of said lease for carrying on its business of generating electricity for light, heat and power purposes by

water power, it acquired 'and as therein alleged''; and further deny that the "hydro-electric plant was erected and installed at great expense"; and further denies that "a large water flume was installed by the plaintiff at great expense"; and further denies that "there was any water 'called for' by said lease to be furnished to plaintiff by the State of Ohio." These answering defendants admit the allegations of subdivision 5, except such as are hereinbefore denied.

6. These answering defendants admit the allegation of subdivision 6.

7. By way of answer to the allegations of subdivision 7, these answering defendants deny the allegation that "the plaintiff purchased the four (4) leases therein mentioned, relying upon the policy declared by the State of Ohio, as set forth in the Bill of Complaint, and upon any long established policy, custom or practice followed by the State of Ohio in granting leases of water from said canal to water users for hydro-electric or other industrial purposes"; and [fol. 55] further deny the allegations as to the legal effect of the leases therein referred to, these answering defendants referring to the terms of said leases for the provisions thereof; and further deny that "the supplementary lease referred to in paragraph marked 'C' of said subdivision was granted for the purpose of enabling the State to give satisfactory and adequate service to the plaintiff and to increase the flow of said canal between said State Dam and said hydro-electric plant, and to increase the revenues of the State of Ohio from said lease"; and further deny that "the plaintiff expended the sum of Fifty-three Thousand Dollars ($53,000.00) in the removal of rock bars and the excavation, deepening and widening of said canal." These answering defendants admit the allegations of subdivision 7, except such as are hereinbefore denied.

8. By way of answer to the allegations of subdivision 8, these answering defendants deny the allegation that "the plaintiff elected to take a renewal of each of said leases, including said supplementary lease"; and further deny that "the plaintiff has paid and is still paying rentals to the State of Ohio in accordance with each and all of said

leases"; and further deny that "plaintiff has fully complied with each and all of the terms and conditions and has fully done and performed the things by it to be done and performed by said lease, including the upkeep, maintenance, repair and improvement of said canal and all equipment and facilities connected therewith and used in the operation of the same, from the point where said canal connects with the Maumee River above said Grand Rapids State Dam northeasterly to said Lock No. 45." These answering defendants admit the allegations of subdivision 8, except such as are hereinbefore denied.

9. By way of answer to the allegations of subdivision 9, these answering defendants deny the allegation that "the plaintiff increased the capacity of said hydro-electric plant in reliance upon the long established policy, custom and practice followed by the State of Ohio in granting leases of water from said canal, or in reliance upon the declaration by the State of Ohio that said Miami and Erie Canal and its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo should be retained and maintained as a public canal"; and further deny that "said auxiliary steam plant was installed and has been maintained for the purpose of assisting the water plant in generating electricity"; and further denies that "electricity is being sold to the public for light, heat and power purposes"; and [fol. 56] further deny that "said hydro-electric plant, including the land, building and equipment, is of the value of Three Hundred Thousand Dollars ($300,000.00) or more"; and further denies that "said leases and water rights are of a minimum value of Four Hundred and Fifty Thousand ($450,000.00) Dollars." These answering defendants admit the allegations of subdivision 9, except such as are hereinbefore denied.

10. These answering defendants admit the allegations of subdivision 10.

11. These answering defendants admit all of the allegations of subdivision 11, excepting as to the legal effect of the Act of the General Assembly therein referred to, and hereby refer to the terms and conditions of said Act as to the legal effect thereof.

12. By way of answer to the allegations of subdivision 12, these answering defendants deny that "plaintiff notified the City of Toledo of its rights under said leases" as therein alleged; and further deny that "the defendant the City of Toledo has at all times since the passage of said Act been aware of plaintiff's water rights and privileges." These answering defendants admit the allegations of subdivision 12, except such as are hereinbefore denied.

13. By way of answer to the allegations of subdivision 13, these answering defendants deny the allegations as to the legal effect of said deed, therein mentioned, and reference is made to said deed as to the legal effect of the terms and provisions thereof. These answering defendants deny that the deed therein referred to provided that the plaintiff and the Milling Company had any rights under said leases to renewals thereof.

14. By way of answer to the allegations of subdivision 14, these answering defendants deny the allegations as to the effect of the decision and judgment of the United States Circuit Court of Appeals, therein referred to, and deny the effect of said decision and judgment as set forth in said subdivision, and refers to the said decision and judgment as to the effect thereof; and further deny that the defendants, "The City of Toledo, Ohio, or the Commissioners of Lucas County, Ohio, or the Villages of Maumee, Ohio and Waterville, Ohio, entered into any conspiracy in relation to the passage of said Act of the General Assembly" as alleged in said subdivision. These answering defendants admit the allegations of subdivision 14, except those hereinbefore denied.

[fol. 57] 15. By way of answer to the allegations of subdivision 15, these answering defendants deny the allegation that "the Act of the General Assembly therein referred to was passed in pursuance of the action of the defendants, the City of Toledo, the Commissioners of Lucas County, Ohio, and the Villages of Maumee and Waterville, Ohio"; and these answering defendants admit the allegations of subdivision 15, except such as are hereinbefore denied.

16. By way of answer to the allegations of subdivision 16, these answering defendants admit, as alleged in sub-

division 16, that there is no other place on the Miami and Erie Canal on which plaintiff can exercise or avail itself of the acts and privileges granted to it under said lease, except on said 18 mile level, and admit that "the plaintiff will realize financial benefit and profit by the the continued use of water taken from said canal." These answering defendants deny that "by virtue of said Act of Abandonment of 1927, plaintiff is deprived of any right or privilege"; and further deny that "plaintiff should be compensated on account of any loss it may sustain by virtue of the provisions of said Act"; and further deny that "there is any confiscation of plaintiff's rights or privileges." These answering defendants admit, as alleged in subdivision 16, that "the defendant George F. Schlessinger, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, in pursuance of the terms of the Act referred to in said subdivision 15, is threatening to, and unless restrained by this Court will, immediately drain the water out of said 18 mile level and prevent water from flowing into said Canal," but deny that any such acts of said defendants will take away any rights or privileges of the plaintiff. These answering defendants admit the allegations of subdivision 16, except such as are hereinbefore denied.

17. By way of answer to the allegation of subdivision 17, these answering defendants deny the allegation that "any rights of the plaintiff will be destroyed, ruined or confiscated by any action to be taken by any of the defendants herein"; and further deny that "any such action on the part of these defendants will be taking of any of plaintiff's property without compensation and without due process of law"; and further deny that "any such taking will be in violation of any of the said leases or in violation of any contract between the State of Ohio and the City of Toledo"; and further deny that "any such action will be in contra- [fol. 58] vention of or contrary to Section 10 of Article I of the Constitution of the United States, or will impair the obligations of any contract or agreement or will be in contravention of or contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United

States"; and further deny that "any such action will be depriving the plaintiff of equal protection of the law."

Further answering the allegations of Subdivision 17, these answering defendants admit the allegations of subdivision 17 that "the plaintiff has generated by the use of water power obtained by it from water therein, pursuant to the terms of said leases from 1911 to 1925, a large amount of electricity," but deny that "said electricity has been sold to the public for less than prices for which it could have been sold had it been generated by steam power." These answering defendants are not advised as to the quantity of the electricity which has been manufactured by the plaintiff during said period, as set forth in said subdivision 17. These answering defendants admit the allegations of said subdivision 17, except such as are hereinbefore denied.

18. These answering defendants say that the Law lease, referred to in subdivision 4 of the Bill of Complaint, the supplementary Law lease, the Tryon lease, and the Maumee Paper Company lease, referred to in subdivision 7 of the Bill of Complaint, provide for the use of water for hydraulic power from points northeast of the portion of said canal abandoned by the 1927 Act of the Ohio General Assembly and are not directly affected by the terms of said Abandonment Act.

19. These answering defendants further say that the plaintiff does not now, and never has since the acquirement of any of said leases, taken any water from that portion of the Miami and Erie Canal abandoned by said Act of 1927, pursuant to said Law lease, supplementary Law lease, Tryon lease, Detwiler lease, Maumee Paper Company lease, and Thomas W. Studer lease, referred to in the Bill of Complaint. That said plaintiff is using water from said canal at a point approximately three and one-half miles northeast from the portion of said canal abandoned as aforesaid; that the plaintiff's use of the water at such points for hydraulic power is now, and was at all times mentioned in the Bill of Complaint, subject to the rights of the State of Ohio, to the abandonment of the canal at its source, to-wit, at Grand Rapids, Ohio.

[fol. 59] Wherefore these answering defendants pray that the Bill of Complaint of the plaintiff be dismissed at plaintiff's costs.

——— ———, Attorney for the Village of Maumee and the Village of Waterville, Ohio.

Duly sworn to by Martin S. Dodd. Jurat Omitted in printing.

[fol. 60] In United States District Court

[Title omitted]

Answer of Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, Commissioners of Lucas County, Ohio

Now come the defendants, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, Commissioners of Lucas County, Ohio, and for answer to the Bill of Complaint of the plaintiff, represent as follows:

1. These answering defendants admit the allegations of subdivision 1.

2. These answering defendants admit the allegations of subdivision 2.

3. By way of answer to the allegations of subdivision 3, these answering defendants deny that "the State of Ohio constructed said canal for the purpose of supplying water for hydraulic purposes and uses in the operation of industrial plants, hydro-electric plants and other industrial enterprises;" and further deny that "the laws of the State of Ohio authorized the Board of Canal Commissioners to locate, construct and put in operation the Miami and Erie Canal for the purpose of supplying water for hydraulic power." These answering defendants admit the allegations of subdivision 3, except such as are hereinbefore denied.

4. By way of answer to the allegations of subdivision 4, these answering defendants deny the allegations as to the [fol. 61] legal effect of acts of the legislature therein re-

ferred to and the terms of any leases therein referred to, said defendants referring to the terms of said acts and the terms of said leases as to the legal effect thereof; and further deny that "said canal has been operated for the purpose of supplying water for hydraulic power to industrial plants, hydro-electric plants and other industrial purposes"; and further deny that "the State of Ohio has entered into a great number of leasing contracts;" and further deny that "the plaintiff, relying upon the laws and constant use and practice followed by the State of Ohio in granting leases of water from said canal, as aforesaid, became the owner of the lease therein mentioned, granted by the State of Ohio to Robert J. Law, Trustee, on March 12, 1895;" and further deny that "the State of Ohio has realized a great amount of income from any such leases;" and further deny that "rentals provided for in said leases have always been paid by plaintiff;" and further deny that "said lease has become renewed and vests in the plaintiff for the renewal period of thirty (30) years from March 12, 1925"; and further deny that "plaintiff has at all times since the acquirement by it of said lease complied with the terms and conditions thereof and has kept said canal and all parts thereof in good order and repair at its own cost and expense and without any expense to the State of Ohio;" and further deny the allegations contained in the last paragraph of subdivision 4. These answering defendants admit the allegations of subdivision 4, except such as are hereinbefore denied.

5. By way of answer to the allegations of subdivision 5, these answering defendants deny the allegation that "on the acquirement of said lease for carrying on its business of generating electricity for light, heat and power purposes by water power, it acquired land as therein alleged;" and further deny that the "hydro-electric plant was erected and installed at great expense"; and further deny that "a large water flume was installed by the plaintiff at great [fol. 62] expense;" and further deny that "there was any water 'called for' by said lease to be furnished to plaintiff by the State of Ohio." These answering defendants admit the allegations of subdivision 5, except such as are hereinbefore denied.

6. These answering defendants admit the allegations of subdivision 6.

7. By way of answer to the allegations of subdivision 7, these answering defendants deny the allegation that "the plaintiff purchased the four (4) leases therein mentioned, relying upon the policy declared by the State of Ohio, as set forth in the Bill of Complaint, and upon any long established policy, custom or practice followed by the State of Ohio in granting leases of water from said canal to water users for hydro-electric or other industrial purposes"; and further deny that "any leases required water to be delivered to the plaintiff at Maumee, Ohio"; and further deny the allegations as to the legal effect of the leases therein referred to, these answering defendants referring to the terms of said leases for the provisions thereof; and further deny that "the supplementary lease referred to in paragraph marked 'C' of said subdivision was granted for the purpose of enabling the State to give satisfactory and adequate service to the plaintiff and to increase the flow of said canal between said State Dam and said hydro-electric plant, and to increase the revenues of the State of Ohio from said lease"; and further deny that "the plaintiff expended the sum of Fifty-three Thousand ($53,000.00) Dollars in the removal of rock bars and the excavation, deepening and widening of said canal." These answering defendants admit the allegations of subdivision 7, except such as are hereinbefore denied.

8. By way of answer to the allegations of subdivision 8, these answering defendants deny the allegation that "the plaintiff elected to take a renewal of each of said leases, in- [fol. 63] cluding said supplementary lease; and further deny that "the said supplementary lease was renewed with said Law lease"; and further deny that "the plaintiff has paid and is still paying rentals to the State of Ohio in accordance with each and all of said leases"; and further deny that "plaintiff has fully complied with each and all of the terms and conditions and has fully done and performed the things by it to be done and performed by said lease, including the upkeep, maintenance, repair and improvement of said canal and all equipment and facilities connected therewith and used in the operation of the same, from the point where said

canal connects with the Maumee River above said Grand Rapids State Dam northeasterly to said Lock No. 45." These answering defendants admit the allegations of subdivision 8, except such as are hereinbefore denied.

9. By way of answer to the allegations of subdivision 9, these answering defendants deny the allegation that "the plaintiff increased the capacity of said hydro-electric plant in reliance upon the long established policy, custom and practice followed by the State of Ohio in granting leases of water from said canal, or in reliance upon the declaration by the State of Ohio that said Miami and Erie Canal, and its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo should be retained and maintained as a public canal"; and further deny that "said auxiliary steam plant was installed and has been maintained for the purpose of assisting the water plant in generating electricity"; and further deny that "electricity is being sold to the public for light, heat and power purposes"; and further deny that "said hydro-electric plant, including the land, building and equipment, is of the value of Three Hundred Thousand Dollars ($300,000.00) or more"; and further deny that "said leases and water rights are of a minimum value of Four Hundred and Fifty Thousand Dollars ($450,000.00)." These answering defendants admit the allegations of subdivision 9, except such as are hereinbefore denied.

[fol. 64] 10. These answering defendants admit the allegations of Subdivision 10.

11. These answering defendants admit all of the allegations of subdivision 11, excepting as to the legal effect of the Act of the General Assembly therein referred to, and hereby refer to the terms and conditions of said Act as to the legal effect thereof.

12. By way of answer to the allegations of subdivision 12, these answering defendants deny that "plaintiff notified the City of Toledo of its rights under said leases" as therein alleged; and further deny that "the defendant the City of Toledo has at all times since the passage of said Act been aware of plaintiff's water rights and privileges." These answering defendants admit the allegations of subdivision 12, except such as are hereinbefore denied.

13. By way of answer to the allegations of subdivision 13, these answering defendants deny the allegations as to the legal effect of said deed, therein mentioned, and reference is made to said deed as to the legal effect of the terms and provisions thereof. These answering defendants deny that the deed therein referred to provided that the plaintiff and the Milling Company had any rights under said leases to renewals thereof.

14. By way of answer to the allegations of subdivision 14, these answering defendants deny the allegations as to the effect of the decision and judgment of the United States Circuit Court of Appeals, therein referred to, and deny the effect of said decision and judgment as set forth in said subdivision, and refer to the said decision and judgment as to the effect thereof; and further deny that the defendants, "The City of Toledo, Ohio, or the Commissioners of Lucas County, Ohio, or the Villages of Maumee, Ohio, and Waterville, Ohio, entered into any conspiracy in relation to the passage of said Act of the General Assembly" as alleged in said subdivision. These answering defendants admit the allegations of subdivision 14, except those hereinbefore denied.

[fol. 65] 15. By way of answer to the allegations of subdivision 15, these answering defendants deny the allegation that "the Act of the General Assembly therein referred to was passed in pursuance of the action of the defendants, the City of Toledo, the Commissioners of Lucas County, Ohio, and the Villages of Maumee and Waterville, Ohio"; and these answering defendants admit the allegations of subdivision 15 except such as are hereinbefore denied.

16. By way of answer to the allegations of subdivision 16, these answering defendants admit, as alleged in subdivision 16, that there is no other place on the Miami and Erie Canal on which plaintiff can exercise or avail itself of the acts and privileges granted to it under said lease, except on said 18 mile level, and admit that "the plaintiff will realize financial benefit and profit by the continued use of water taken from said canal." These answering defendants deny that "the plaintiff is longer entitled to take water from said canal"; and further deny that "by virtue of said Act of

Abandonment of 1927, plaintiff is deprived of any right or privilege"; and further deny that "plaintiff should be compensated on account of any loss it may sustain by virtue of the provisions of said Act;" and further deny that "there is any confiscation of plaintiff's rights or privileges." These answering defendants admit, as alleged in subdivision 16, that "the defendant George F. Schlessinger, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, in pursuance of the terms of the Act referred to in said subdivision 15, is threatening to, and unless restrained by this Court will, immediately drain the water out of said 18 mile level and prevent water from flowing into said canal," but deny that any such acts of said defendant will take away any rights or privileges of the plaintiff. These answering defendants admit the allegations of subdivision 16, except such as are hereinbefore denied.

[fol. 66] 17. By way of answer to the allegations of subdivision 17, these answering defendants deny the allegation that "any rights of the plaintiff will be destroyed, ruined or confiscated by any action to be taken by any of the defendants herein"; and further deny that "any such action on the part of these defendants will be the taking of any of plaintiff's property without compensation and without due process of law"; and further deny that "any such taking will be in violation of any of said leases or in violation of any contract between the State of Ohio and the City of Toledo"; and further deny that "any such action will be in contravention of or contrary to Section 10 of Article 1 of the Constitution of the United States, or will impair the obligations of any contract or agreement, or will be in contravention of or contrary to Section 1 of Article XIV of the amendments to the Constitution of the United States"; and further deny that "any such action will be depriving the plaintiff of equal protection of the law."

Further answering the allegations of subdivision 17, these answering defendants admit the allegations of subdivision 17 that "the plaintiff has generated by the use of water power obtained by it from water therein, pursuant to the terms of said leases from 1911 to 1925, a large amount of electricity," but deny that "said electricity has been sold to the public for less than prices for which it could have

been sold had it been generated by steam power." These answering defendants are not advised as to the quantity of the electricity which has been manufactured by the plaintiff during said period, as set forth in said subdivision 17. These answering defendants admit the allegations of said subdivision 17, except such as are hereinbefore denied.

18. These answering defendants say that the Law Lease, referred to in subdivision 4 of the Bill of Complaint, the supplementary Law Lease, the Tryon lease, and the Maumee Paper Company lease, referred to in subdivision 7 of the Bill of Complaint, provide for the use of water for hydraulic power from points northeast of the portion of said canal abandoned by the 1927 Act of the Ohio General Assembly and are not directly affected by the terms of said Abendonment Act.

[fol. 67] 19. These answering defendants further say that the plaintiff does not now, and never has since the acquirement of any of said leases, taken any water from that portion of the Miami and Erie Canal abandoned by said Act of 1927, pursuant to said Law Lease, supplementary Law lease, Tryon lease, Detwiler lease, Maumee Paper Company lease, and Thomas W. Studer lease, referred to in the Bill of Complaint. That said plaintiff is using water from said canal at a point approximately three and one-half miles northeast from the portion of said canal abandoned as aforesaid; that the plaintiff's use of the water at such points for hydraulic power is now, and was at all times mentioned in the Bill of Complaint, subject to the rights of the State of Ohio, to the abandonment of the canal at its source, to-wit, at Grand Rapids, Ohio.

Wherefore these answering defendants pray that the Bill of Complaint of the plaintiff be dismissed at plaintiff's costs.

L. D. Hunt, H. A. Krueger, Solicitors.

Duly sworn to by Ralph V. Farnsworth. Jurat omitted in printing.

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE EVIDENCE, ETC.

In addition to the admissions made and contained in the pleadings it is hereby stipulated and agreed by and between the parties plaintiff and defendant and by and between their respective counsel in this cause, as follows:

1. That so far as they are material to the issues involved in this cause, the originals of the leases, agreements and application for renewal thereof, grants, deeds, records of administrative boards, resolutions, ordinances, corporation records of electricity generated, court records, pleadings, orders and decrees; letters, special and general laws of the State of Ohio, and court opinions and decisions, and other instruments and documents listed below in this stipulation, may be considered as offered and received in evidence without formal proof and that copies of the same respectively, except said laws, opinions and decisions, are attached hereto and may be used in evidence in lieu of the originals and be designated as stipulation exhibits numbered consecutively from 1 upward.

Stipulation Exhibit No. 1. Robert J. Law, Trustee, Lease.

Stipulation Exhibit No. 2. Agreement and Supplemental Lease.

Stipulation Exhibit No. 3. Thomas W. Studer Lease.

[fol. 69] Stipulation Exhibit No. 4. A. C. Tyron Lease.

Stipulation Exhibit No. 5. The Maumee Paper Company Lease.

Stipulation Exhibit No. 6. The George K. Detweiler Lease.

Stipulation Exhibit No. 7. The James Purdy Quit Claim Grant to State of Ohio.

Stipulation Exhibit No. 8. The Peter Minor Lease.

Stipulation Exhibit No. 9. Proceedings of the Board of Public Works of the State of Ohio on the claim of Peter Minor, under date of February 23, 1846.

Stipulation Exhibit No. 10. The Toledo Grain and Milling Company Lease.

Stipulation Exhibit No. 11. Resolution of the Council of the City of Toledo accepting appraisement and declaring

intention of the City of Toledo to purchase the abandoned bed of the Miami & Erie Canal included in the provisions of House Bill No. 560 General Assembly of Ohio, published in Volume 108, Part 2, pages 1138 to 1141, Laws of Ohio, passed January 22, 1920; said resolution having been passed by said City Council September 11, 1922.

Stipulation Exhibit No. 12. Ordinance No. 3043 passed by City Council of Toledo, Ohio, September 10, 1923, authorizing Director of Public Service to take necessary steps for eliminating water in the Miami & Erie Canal and to make settlement with The Defiance Gas & Power Company (so-called) and The Toledo Grain & Milling Company.

It is agreed that by mistake the name "The Defiance Gas & Power Company" was used instead of "The Maumee Valley Electric Company," plaintiff in this cause.

Stipulation Exhibit No. 13. Resolution by the City Council of Toledo declaring it necessary to cut off the flow of water of the Miami & Erie Canal at the southerly end of the portion of that canal acquired by said City and authorizing and directing the Director of Public Service to proceed to that end, passed March 9, 1925.

Stipulation Exhibit No. 14. Corporation record of the plaintiff, The Maumee Valley Electric Company, showing the kilowatt hours of electricity generated at the hydro-electric plant located in Maumee, Ohio, as mentioned and described in the Bill of Complaint, for the years 1914 to 1927, both inclusive, to and including March, 1928.

Stipulation Exhibit No. 15. Deed from the State of Ohio to the City of Toledo, Ohio, for the canal lands therein described executed and delivered by the Governor of Ohio on December 29, 1922.

Stipulation Exhibit No. 16. Final decree filed July 7, 1925 in Case No. 515 in Equity, The Maumee Valley Electric Company, Plaintiff, vs. The City of Toledo, Ohio, et al., Defendants, in the District Court of the United States for [fol. 70] the Northern District of Ohio, Western Division.

Stipulation Exhibit No. 17. Final decree filed May 14, 1926, in Case No. 4483, The Maumee Valley Electric Company, Appellant, vs. The City of Toledo, et al., Appellees, in the United States Circuit Court of Appeals for the Sixth Circuit, and being the decree entered in said Court of Appeals on appeal thereto from said final decree in said Case No. 515 in equity above mentioned.

Stipulation Exhibit No. 18. Final decree on mandate from the United States Circuit Court of Appeals in said Case No. 515 in equity.

Stipulation Exhibit No. 19. Application by plaintiff, The Maumee Valley Electric Company for renewal of said Robert J. Law, Trustee, lease, Supplemental Lease and Agreement, George K. Detweiler lease, A. C. Tryon lease, The Maumee Paper Company lease and Thomas W. Studer lease.

Stipulation Exhibit No. 20. Petition in the case of The Maumee Valley Electric Company, Plaintiff, vs. Louis A. Boulay, individually and as Superintendent of Public Works of Ohio, etc., Defendant, filed March 14, 1925 in the Court of Common Pleas of Franklin County, Ohio, as Case No. 101344 in that court.

Stipulation Exhibit No. 21. Entry and Order of Temporary Injunction made and entered in said Case No. 101344.

Stipulation Exhibit No. 22. Letter from plaintiff The Maumee Valley Electric Company to Honorable Victor Donahey, Governor of the State of Ohio, under date of April 2, 1925, relative to Senate Bill No. 148 and the renewal to plaintiff of said Robert J. Law and other leases.

2. That the sections of the Constitution of the State of Ohio, the Legislative Acts and Resolutions of the General Assembly of Ohio and of the State of Indiana and the Legislative Acts of the Congress of the United States, all as listed on Stipulation Exhibit No. 23 filed hereunder in this cause, and any other special or general Act or Resolution of said General Assembly of Ohio relating to the Miami & Erie Canal, together with the opinion and decision of the United States Circuit Court of Appeals for the Sixth Circuit, reported in Volume 13, 2nd Series, Federal Reporter, pages 98 to 105 inclusive, deciding Case No. 4483 in that court and being the appeal thereto by the plaintiff here from said decree of the District Court of the United States for the Northern District of Ohio, Western Division in said Case No. 515 in equity in said District Court, shall be considered as in evidence before this court and any reviewing court so far as relevant and material to this controversy, without incorporating the same a part of the record in this case; and that counsel for either plaintiff or defendants may

[fol. 71] refer to or quote any provision or provisions, part or parts thereof in argument or brief as if matters of judicial notice, subject to correction by opposing counsel through reference to and quotation from authentic publications without encumbering the record in this cause by formally incorporating the same in full as a part of such record.

3. That the testimonial statements of Harden L. Crawford, President of plaintiff company, and E. A. Dorszeski and Lewis E. Ayres, Hydraulic Engineers, are received in evidence as set out in Stipulation Exhibit No. 24 filed hereunder in this cause, and that if duly called and sworn as witnesses in this cause, they respectively would testify as shown and stated in said Stipulation Exhibit No. 24.

4. That plaintiff, with the knowledge and consent of the State of Ohio, became the owner of the leases, agreements and grants, of which Stipulation Exhibits Nos. 1 to 6 inclusive are copies respectively, on the dates respectively as alleged in the bill of complaint; that on the 27th day of April, 1910, it became the owner of the Purdy quit claim grant, of which Stipulation Exhibit No. 7 is a copy; that it still is the owner of all of said leases, agreements and grants and since its said ownership began has operated and still is operating said leases, agreements and grants in the manner and for the purposes as set forth in the bill of Complaint; that through mistake of counsel said Purdy quit claim grant, of which Stipulation Exhibit No. 7 is a copy, was not set up in the bill of complaint as one of the grants belonging to the plaintiff and it is agreed that said grant and the rights therein reserved to the grantor, James Purdy, became, on the 27th day of April, 1910, and still are, the property of the plaintiff and that they were so acquired and have been and still are operated in connection with and for the same purposes as plaintiff has operated and still is operating said other leases, agreements and grants, of which Stipulation Exhibits Nos. 1 to 6 are copies; and that this stipulation and other stipulations with respect to said Purdy quit claim grant set out in this stipulation and agreement between the parties in this cause on the evidence, shall be accepted as true statements as to the acquirement, purpose of acquirement, ownership and operation of said Purdy grant by plaintiff in lieu of an [fol. 72] amendment of the bill of complaint showing such

facts and that under such statement of facts with reference thereto said Purdy quit claim grant shall be considered in evidence as though such facts had been set up in the bill of complaint or in an amendment thereof.

This paragraph shall not be deemed to be an admission by defendants of any rights in plaintiff outside of those granted by law governing this case under said leases, grants and agreements and the other evidence and facts in this case.

5. That throughout the time from the acquirement by plaintiff of said leases, agreements and grants, respectively, Stipulation Exhibits Nos. 1 to 7 inclusive, to the present time, all rentals called for by them respectively have been paid by plaintiff to and accepted by the State of Ohio at the respective times specified in said leases, agreements and grants, respectively, including such payments on said Law lease, Stipulation Exhibit No. 1, and Supplementary Agreement, Stipulation Exhibit No. 2, since March 12, 1925; and that as alleged in the bill of complaint, plaintiff has throughout the time of its ownership of said leases, agreements and grants, respectively, performed all the obligations stipulated in each of them for plaintiff to perform.

6. That plaintiff filed its application with the Director of Highways and Public Works and Superintendent of Public Works at Columbus, Ohio, on August 7, 1924 for a renewal of said Law, Supplemental, Studer, Tryon, Maumee Paper Company and Detweiler leases, Stipulation Exhibits Nos. 1 to 6 inclusive, of which application Stipulation Exhibit No. 19 is a copy.

7. That prior to and at the time of the purchase by defendant City of Toledo, Ohio of the north end of said Miami & Erie Canal extending from Swan Creek in said City of Toledo south a distance of 8.87 miles, as provided for in said Act of the General Assembly of the State of Ohio passed January 22, 1920, 108 Ohio Laws, Part 2, page 1138, said City was aware and had knowledge of plaintiff's claim to water rights under its aforesaid alleged leases, agreements and grants.

8. That all the water taken from the canal by plaintiff under its leases, agreements and grants, is taken out of said

canal by plaintiff at said hydro-electric plant in the Village of Maumee, located as shown in Stipulation No. 14 and in Stipulation Exhibit No. 25, and is discharged by plaintiff into the Maumee River after use thereof by plaintiff and is not returned to the canal.

[fol. 73] 9. That no written lease in renewal of the Law lease and Supplement thereto has ever been delivered by the State of Ohio to the plaintiff.

10. That plaintiff has never paid or tendered any rental under any of its water leases to defendant The City of Toledo.

11. That the case of The Maumee Valley Electric Company, a corporation, Plaintiff, vs. Louis A. Boulay, individually and as Superintendent of Public Works of Ohio and as Director of the Department of Highways and Public Works of that state, Defendant, No. 101344 on the docket of the Court of Common Pleas of Franklin County, Ohio, was duly begun on March 14, 1925; that Stipulation Exhibit No. 20 filed hereunder is a true copy of the petition filed in that case; that Stipulation Exhibit No. 21 is a true copy of the entry granting a temporary injunction entered on that day and duly served upon said defendant in that case, Louis A. Boulay; that Stipulation Exhibit No. 22 is a true copy of a letter sent to the Governor of the State of Ohio on April 2, 1925 and that a copy thereof was on that day sent to said defendant Boulay and to his Assistant Superintendent of Public Works of Ohio at Columbus, Ohio.

12. That said eighteen-mile level of said Miami & Erie Canal mentioned in the bill of complaint comprises that part of said Miami & Erie Canal extending from Lock No. 45 on said canal located about one-half mile north of said hydro-electric plant in the Village of Maumee southwesterly to the Guard Lock, otherwise known as Lock No. 9 on said canal and on the north bank of the Maumee River in Lucas County, Ohio, opposite said Village of Grand Rapids, Ohio, said Guard Lock being about three-fourths of a mile northeasterly from the point where said Miami & Erie Canal connects with the Maumee River above said Grand Rapids State Dam.

There is no hydro-electric or other plant or means at or through which plaintiff can use the water leased to it under its said leases, agreements and grants on said canal except at said hydro-electric plant mentioned and described in the bill of complaint and Stipulation Exhibit No. 24 and there is no source from which water may be procured to operate said hydro-electric plant except from said Miami & Erie [fol. 74] Canal at the point and as described in the bill of complaint.

13. That upon the acquirement by plaintiff of said Law lease, plaintiff acquired the land at Farrar Street in the Village of Maumee, Ohio on which was and is located the hydro-electric plant mentioned in the bill of complaint and Stipulation Exhibit No. 24 and that as a part of the work of increasing the capacity of said plant as mentioned in the bill of complaint and said Stipulation Exhibit No. 24, plaintiff excavated and constructed through the land on and along the west side of said Farrar Street from the southerly side of said Miami & Erie Canal southeasterly a distance of three hundred feet to the River Road so-called at a point just above said hydro-electric plant, all in the Village of Maumee, Ohio, an open water flume fifty feet in width at the top—forty feet in width at the bottom and about twelve feet deep. That the water used in the operation of said hydro-electric plant is drawn from said canal through said open water flume to said point above said hydro-electric plant on the west side of said River Road and from there it is carried through iron flumes under the ground down to the turbine wheels of said plant at a fall of sixty-one feet.

14. That Stipulation Exhibit No. 25 is a map of the two lineal parts of said Miami & Erie Canal in question in this case and is a true representation thereof and of its termini, location with respect to the Maumee River, Broadway and River Road, so-called, the location of Swan Creek into which said canal empties at its present northerly end, as mentioned in the bill of complaint, the location of The Toledo Grain & Milling Company mill, Lock No. 45 on said canal, the location of said hydro-electric plant mentioned in the bill of complaint and Stipulation Exhibit No. 24, the open water flume leading from said canal southeasterly to said hydro-electric plant, the Village of Maumee, Ohio, the

Maumee side-cut or outlet from said canal down to the Maumee River at a fall of fifty-five feet, the Village of Waterville, Ohio, Guard Lock or Lock No. 9 on said canal, the Town of Providence, unincorporated, in Lucas County, Ohio, the Village of Grand Rapids in Wood County, Ohio, the flour mill just above the Guard Lock on the north bank of the Maumee River, the Grand Rapids State Dam and the connection of said canal with Maumee River.

[fol. 75] The waters in said canal and in said Maumee River run northeasterly and the lineal part of said canal purchased by defendant City of Toledo under provisions of the Act of the General Assembly of Ohio passed January 22, 1920, 108 Ohio Laws, Part 2, pages 1138 to 1141, inclusive, extends from the present northerly end of said canal at its outlet into Swan Creek southwesterly to a line across said canal 1.6 miles southwesterly from said open water flume carrying water to said hydro-electric plant, said line being just northeasterly of said Maumee side-cut.

The lineal part of said canal sought to be abandoned under the Act of the General Assembly of the State of Ohio passed May 11, 1927, 112 Ohio Laws, 360 to 363, (see Stipulation Exhibit No. 23, par. 55) extends from said line just northeasterly of said Maumee side-cut southwesterly to where said canal connects with the Maumee River above and southwesterly from the Grand Rapids State Dam.

All of the waters delivered by plaintiff to said hydro-electric plant are carried from the pool in said Maumee River above and southwesterly from said dam through said Miami & Erie Canal northeasterly past said Maumee side-cut and on northeasterly over said 1.6 miles of that part of said canal purchased by defendant City of Toledo as aforesaid to said water flume and through said water flume to said hydro-electric plant.

15. Since the acquirement by plaintiff of the Purdy Grant, Stipulation Exhibit No. 7, no water reserved by said grant has been taken out of the pool in the Maumee River on the south side thereof from above said Grand Rapids State Dam but all of such reserved water has been and is being diverted in said pool and taken out by plaintiff on the north side of said river and through said canal to said hydro-electric plant, as shown in paragraph 14 hereof and Stipulation Exhibit No. 25.

16. That upon completion by tby State of Ohio of the respective sections of the Miami & Erie Canal, namely, Miami Canal, Miami Extension Canal and Wabash & Erie Canal, the State of Ohio made water leases and grants to and agreements with persons, firms and corporations along said respective sections for the purpose of supplying water from said respective sections of said canal for hydraulic purposes to industrial plants, hydro-electric plants and for [fol. 76] other industrial purposes, said water being furnished by the State of Ohio for such purposes to such users of such water along the line of said respective sections of said canal under said leases, grants and agreements in consideration of the payment by said users of rentals or other considerations in such amounts and of such character as stipulated and agreed upon to be given by such users to the State of Ohio from time to time throughout the rental periods called for in such leases, grants and agreements, respectively; that similar leases, grants and agreements were made by the State of Ohio with respect to the various sections of the Ohio and other canals in the eastern and central part of Ohio; that said practice was followed with respect to said canals and the various sections thereof from the completion thereof at numerous places where water power was available or could be developed throughout the time said canals were operated for the purposes of navigation and said practice of furnishing water power by the State of Ohio as aforesaid has been continued down to the present time; that such leases, grants and agreements have been made on the Miami & Erie Canal and the waters connected therewith to the number of about —, bringing to Ohio a revenue in the aggregate of about $9,000,000.00, and on said Ohio and other canals and the waters connected therewith to the number of about —, bringing to the State of Ohio a revenue in the aggregate of about $9,000,000.00.

17. The only leases, agreements or grants permitting the taking of water from the Miami & Erie Canal between the point where said canal connects with the Maumee River above and southwesterly from said Grand Rapids dam and Swan Creek in the City of Toledo, are those of the plaintiff, copies of which are Stipulation Exhibits Nos. 1 to 7

inclusive, the lease of The Toledo Grain & Milling Company, copy of which is Stipulation Exhibit No. 10, and the grant and agreement between the State of Ohio and Peter Minor, as shown by Stipulation Exhibits Nos. 8 and 9. The waters used under the Minor grants and agreements, as shown by Stipulation Exhibits Nos. 8 and 9, are taken out of said canal at a point just above Guard Lock, or Lock No. 9, on said canal and are there used to operate a small flour and feed mill situated on the southerly side of said canal and the north bank of the Maumee River, said waters [fol. 77] so used passing from said canal as aforesaid through said mill operating the same and out into the Maumee River.

18. That throughout the time within which the events hereinafter in this paragraph occurred Fred J. Mery was the Mayor, William B. Guitteau was the Director of Service, Frank M. Dotson was the Director of Law and Frank Miller was the Commissioner of the Division of Water of Defendant the City of Toledo, Ohio; defendants Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman were the County Commissioners of Lucas County, Ohio; and John Smith was the Mayor of defendant the Village of Maumee, Ohio. Said persons above named urged a State Senator from Lucas County, Ohio to introduce into the General Assembly of Ohio for passage at the session of that General Assembly which convened the forepart of January, 1927, said Senate Bill No. 48 mentioned in the bill of complaint which afterwards became Amended Senate Bill No. 48; that said State Senator introduced said Bill in said General Assembly in the forepart of said session; that said above named persons, together with many owners of property along said Miami & Erie Canal in the City of Toledo and Village of Maumee, Ohio, continually urged the approval of said Bill, after its said introduction, before the committee of both the Senate and the House of Representatives of said Assembly to which said Bill had been referred for consideration, said State Senator being a member of such committee in said Senate; and in the same manner said persons urged the passage of said Bill by both the Senate and the House of Representatives of said Assembly; that said Bill was passed by both Houses

of said Assembly but was vetoed by the Governor of Ohio whereupon said persons in the manner aforesaid urged the passage of said Bill over the Governor's veto; that said Bill was passed over the Governor's veto, took effect on August 10, 1927 and is found in Volume 112, Ohio Laws, pages 360 to 363 and is the Act the constitutionality of which is questioned in this case; that said persons urging the introduction and passage of said Bill as aforesaid urged Lucas County's two State Senators and its five members of the House of Representatives in said General Assembly to work for and procure the passage of said Bill, and that said State Senators and members of said House of Representatives complied therewith.

[fol. 78] 19. That the bill of complaint in this case may be amended by inserting the figure "4" at the beginning of the last paragraph thereof on page 5 of said bill and that in the ninth line from the top of page 2 of said bill the words "as a village" may be stricken out.

20. The Toledo and Napoleon Road indicated on Stipulation Exhibit No. 25 is otherwise known as "River Road" and is an extension southwesterly along the Maumee River of the streets known as Broadway and Summit Street in Toledo, Ohio.

21. That plaintiff has no means of conveying to said hydro-electric plant, located as shown in Stipulation No. 14 and in Stipulation Exhibit No. 25, water from leases or agreements marked Stipulation Exhibits Nos. 3, 4, 5, 6, 7 and 8 except through said canal and by passing through said canal from the point specified in the aforesaid exhibits along and through said canal to said hydro-electric plant.

22. It is hereby agreed that this stipulation and agreement between the parties plaintiff and defendant on the evidence is only for the purposes of this case in this court and on any review thereof in any reviewing court.

The Maumee Valley Electric Company, by U. E. Denman and Karl N. Burr, Solicitors for Plaintiff. George F. Schessinger, Director of Highways, by Edward C. Turner, Attorney General of Ohio. Albert M. Calland and Joseph A. Godown,

Solicitors for Defendant Schlessinger. City of Toledo, by Geo. W. Ritter, Its Director of Law, and Martin S. Dodd, Its Asst. Director of Law, Solicitors for the City of Toledo. Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, Commissioners of Lucas County, by Leroy W. Hunt, Prosecutor of Lucas County, Solicitor for said Commissioners. Village of Waterville, Village of Maumee, Defendant Villages, by Geo. W. Ritter and Martin S. Dodd, Their Solicitors.

[fol. 79] STIP. EX. 1

Lease of Water Power to Robert J. Law, Trustee

Date March 12, 1895

Rents Payable at Toledo, Ohio, M. & E. Canal

Recorded —— —, ——

By authority of a resolution adopted by the Board of Public Works August 8, 1899, this lease was transferred to George G. Metzger, Trustee.

(Signed) Wm. T. McLean, Sec'y B. P. W.

By authority of a resolution of the Board of Public Works of Ohio passed at its regular monthly meeting held September 11, 1900, this lease was transferred from George G. Metzger, Trustee, to The Maumee Valley Electric Company, and said Company was granted permission to sublet any of the privileges they enjoy under this lease.

(Signed) Wm. T. McLean, Sec'y B. P. W. of Ohio.

[fol. 80] This agreement, made this 12th day of March, 1895, between the State of Ohio, party of the first part, by Frank J. McCulloch, Acting Commissioner of the Board of Public Works thereto duly authorized by law, and by the order of the Board of Public Works made in pursuance thereof, and Robert J. Law, Trustee, party of the second part, Witnesseth: That said party of the first part, in con-

sideration of the rents reserved and the covenants of the party of the second part hereinafter contained and upon the express condition that the party of the second part shall continue during the whole of his term to comply with all and singular the limitations and conditions hereinafter contained, and shall, in every respect, perform all the stipulations of this agreement by said party to be performed, agrees to sell and lease to said party of the second part, for the term of 30 years, from and after the 12th day of March 1895 subject to the restrictions, limitations and conditions herein contained, the use and occupation of all the surplus water of the Miami and Erie Canal between Providence and Toledo not needed for navigation or not now under lease.

The water hereby leased to be taken out of the level of the Miami & Erie Canal at Maumee and to be conveyed to the mills or other hydraulic works from between two regular weirs to be constructed by, and at the expenses of the party of the second part as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, agrees to pay to said State the yearly rent or sum of $500.00, provided the party of the second part shall not be deprived of the use thereof for more than one month in the aggregate, in any one year. And if for the purpose of repairing the Canal, preventing breaches, removing bars, or other obstructions, or making any improvements to the Canal or works connected therewith, or in consequence of breaches or the inadequacy of the supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the water power hereby leased, so as to prevent the operation of any hydraulic works usually propelled by the water power hereby leased, such deduction shall be made from the rent accruing on such por-
[fol. 81] tion of the water power as the said party is so prevented from using, as will bear the same proportion to the yearly rent thereof, as the time during which the said party has been deprived of its use, bears to eleven months; the rent to be paid semi-annually, on the first day of May and November in each and every year, during the continuance of this lease, to the Collector of Canal Tolls, at Toledo, Ohio, or other Agent of the State authorized to receive the same.

And the said party of the second part further agrees to erect, at his own expense, in a good, secure, substantial and workmanlike manner, the regulating weir above mentioned, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a plan to be furnished by the acting Commissioner or Engineer employed on any adjoining part of the Canal, and under the direction and subject to the inspection of such Acting Commissioner or Engineer; the weir over which the water is drawn from the Canal to be so placed and formed that the top of the weir shall not be more than six inches below the level, at which it shall be designed to sustain the surface of the water in that part of the Canal from whence the water is to be drawn, and the other or second weir to be so placed and formed that the top thereof will be at least one inch lower than the top of the weir over which the water is drawn from the canal; and of such length and otherwise so constructed that a uniform quantity of water will flow from the upper to the lower levels of the Canal, whether the hydraulic works are in operation or not.

And it is further expressly agreed that the party of the second part shall not, for any purpose or in any manner whatever, obstruct the equal and regular flow of water from one level of the Canal to another, nor increase the flow, nor cause the water, or any part thereof to flow out of the Canal except as herein provided; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in or about the mills or hydraulic works propelled by water hereby leased. And said party of the second part shall be considered and held responsible for keeping the regulating weirs above described constantly in good repair and free from all obstructions; and a failure to do so or an interference with the flow of water on their [fol. 82] part, or on the part of any person employed in or about said mills or hydraulic works aforesaid, shall be adjudged a forfeiture of this lease, and of all the rights and privileges of the said party growing out of this agreement.

And said party of the second part further agrees to construct the head race, tail race, and other works and devices connected with the use of water hereby leased.

And the said party of the second part further agrees, during the continuance of this lease, to keep constantly in good

order and repair the weir, head and tail race, and all other works and devices connected with the use of the water hereby leased, so far as the same shall be necessary to secure the regular and uniform flow of water from the upper to the lower levels, and also to prevent any breach in the bank, the formation of a bar or other injury to the Canal, or impediment to the navigation thereof; and if, nevertheless, any such breach, bar, or other injury or impediment should occur in consequence of any of said works not being faithfully and substantially constructed, or being suffered to be out of repair, then said party of the second part shall, on being notified thereof by said Acting Commissioner, Engineer, or other proper Agent of the State, immediately repair said breach or other injury; or if such Agent of the State shall cause the same to be done, (which he is hereby authorized at his option to do,) then said party of the second part shall pay to said Agent all necessary expenses incurred in repairing such breach or other injury, on demand.

It is expressly understood and agreed, by and between the parties, that for the purpose of preventing or repairing breaches, removing bars or other obstructions to the navigation of the Canal, or for the purpose of making any improvements in the Canal, or the works or devices connected therewith, any authorized Agent of the party of the first part, may cause the water to be drawn, either partially or wholly out of the Canal, and to remain so drawn out so long as may be necessary for any of the aforesaid purposes; and the said party of the second part shall not be entitled to any deduction from the rent hereby made payable, unless said party shall thereby be deprived of the use of the water for [fol. 83] more than one month in any one year; and the party of the first part reserves the right to resume, at any time, the use of the water hereby leased, whenever the same shall become necessary for the purpoes of navigation, and to continue the use thereof so long as the same shall be necessary for the purpose aforesaid; and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the whole thereof for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privilege, (which fact shall be determined by three judicious, disinterested freeholders, one to be chosen by the Acting Com-

missioner, or other authorized Agent of the State, one by the party of the second part, and the third by the two thus chosen,) then the party of the second part shall be from such time absolved from all further liabilities growing — of this agreement.

And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided, such buildings shall be erected on land belonging to the State, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease.

And said party of the first part, in consideration of the rents and agreements hereinbefore specified, further agrees to lease to the party of the second part, upon the same conditions, and subject to the same limitations and restrictions herein contained, all that certain piece or parcel of land, situate in Maumee in Lucas County, Ohio, butted, bounded, and described as follows:

[fol. 84] Beginning at the easterly side of River Tract No. Twenty-two in the 12 mile square Reserve at the foot of the rapids of the Miami of Lake Erie, in the South margin of the Wabash (now Miami and Erie) canal at the water edge at any point between the West line of Forrer Street and the East line of Wolcott's Basin, in the said Wolcott's Addition to Miami City and running from thence southerly along and near the West line of said Forrer Street, to the Maumee River on the bank and along the margin thereof, on River tracts numbers 21 or 22, hereby giving, granting and conveying unto the said lessee all the land in one or both of said River tracts number 21 and 22 sufficient for all the necessary use and occupation of a water power, to

enable the party of the second part to use and enjoy the use of the water power hereby leased, for the like term of 30 years from the twelfth day of March, 1895.

It is further understood and agreed, that said party of the second part shall not sell, assign or transfer his right or interest derived from this agreement, or any part thereof, to any person or persons, unless the assent of some authorized Agent of the State shall be first obtained therefor in writing.

And if, at any time, any installment which shall become due for rent as hereinbefore expressed, shall remain unpaid for one month from the time the same shall fall due, or if the party of the second part shall, in any respect, fail to fulfill and perform all the engagements of said party hereinbefore expressed, or shall do, or permit to be done, any act or thing hereby prohibited, or shall, in any respect, violate this agreement, then, and in either case, all the rights and privileges derivable to said party from this agreement, shall from the time of such failure or violation cease and determine; and any authorized Agent of the State or lessee under said State, shall have full right and power to enter upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part; and said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

The land hereby described and leased to the said party of [fol. 85] the second part is the same tract conveyed by James Wolcott and wife on the 10th day of November, 1845 and recorded in Volume 12, pages 615 and 617 inclusive of the Lucas County Ohio Records of deeds and also Recorded in Volume 1, pages 384 and 385 of Deeds and Leases of the State Board of Public Works. The payments of rent to commence November 1st, 1895, or from date of use of water previous thereto.

In testimony whereof, The parties executed this agreement the day and year first above written.

(Sgd.) E. L. Lyburger. (Seal.) (Sgd.) Chas. E. Groce. (Seal.) (Sgd.) Frank J. McColloch. (Seal.) (Sgd.) Robert L. Law, Trustee. (Seal.)

Signed, sealed and delivered in presence of (Signed) Wm. T. McLean, as to B. P. W. (Signed) Geo. K. Detwiler, George D. Palmer, Jr.

By authority of a resolution passed by the Board of Public Works on May 14th, 1895 this lease was transferred by Robt. J. Law, Trustee, to Wm. B. Taylor, Trustee.

(Sgd.) Wm. T. McLean, Secy. Bd. Pub. Wks.

[fol. 86] STIP. EX. 2

This agreement and supplementary lease, made this — day of December, A. D. 1910, by and between the State of Orio, by George W. Watkins, B. W. Baldwin and William Kirtley, Jr., members of the Board of Public Works, duly authorized in the premises, hereinafter called the "State" and The Maumee Valley Electric Company, a corporation organized and existing under the laws of the State of Ohio, hereinafter called the "Company," Witnesseth:

That whereas, the Company is the duly authorized assignee of a certain lease between the State of Ohio, and R. J. Law, trustee, dated March 12, 1895, and running for a period of thirty (30) years from that date, under the terms of which lease the State has sold and leased to said Company all the surplus water of the Miami & Erie Canal between Providence and Toledo, not needed for navigation, and not under lease at the date last before mentioned; and

Whereas, the parties hereto have mutually agreed that the service rendered under the terms of said lease is unsatisfactory, and that the compensation named in said lease is inadequate for proper and satisfactory service; and

Whereas, to increase the flow of water in said canal between the village of Grand Rapids and the Company's weir, with the consent of the state, the Company has undertaken, at its own proper expense, to remove the rock bars in the canal near the village of Waterville, and also to remove other obstructions from the canal on the eighteen mile level between Grand Rapids and Lock No. 45, and to raise the banks of said canal in certain places; and

Whereas, the Company is willing to pay the expense of a proper patrol system from the village of Grand Rapids to Lock No. 45, in order to prevent breaks in the canal banks, repair leaks, remove logs, brush and other impediments to the free and even flow of water in the canal; and

Whereas, the Company is further willing to pay an increased rental for the use of the water granted by the terms [fol. 87] of said lease hereinbefore described, provided a

high water level is at all times maintained in said portion of said canal.

Now, therefore, for and in consideration of the foregoing and of the covenants on the part of each of said parties to be performed as hereinafter set forth, said parties have, and by these presents do mutually agree as follows:

First. The State agrees to cause to be let into the eighteen miles level of said Miami & Erie Canal at Grand Rapids, from the pool above, waters of the Maumee River equal to the safe capacity of said canal, for use for hydraulic purposes at the works of the Company, located near Maumee, and to cause as large steady and even flow of such waters as may be practicable, except in cases of unavoidable accident or public necessity, all consistent with the rights of navigation upon said canal.

Second. The State agrees to require its superintendent of canals for the northern division of said Miami & Erie Canal, to appoint three (3) patrolmen, who shall be paid for their services by said company, and who shall be required to patrol said canal banks between the Village of Grand Rapids and Lock No. 45, to repair breaks in the canal banks, stop leaks, remove logs, brush and other impediments to the free and even flow of water.

Third. The State does sell and lease unto the Company all of the increased water passing over the weir of said Company, provided for by this agreement.

Fourth. The Company agrees to maintain its weir at all times, at the level at which the same is now constructed or, on the order of the Board of Public orWks, at such level as said Board may hereafter require.

Fifth. The Company further agrees to complete the excavation of the rock bars in the canal near Waterville, as well as the removal of all other obstructions in said canal on the eighteen mile level, and to raise the banks thereof, with all possible diligence, and at its own proper expense.

Sixth. The Company further agrees to pay the compensation of the three (3) patrolmen to be appointed by the State, at a daily wage of not less than One Dollar and twenty-five cents ($1.25).

[fol. 88] Seventh. The Company further agrees to pay to the State the following sums in addition to the sums required to be paid under the terms of said lease dated March 12th, 1895, hereinbefore mentioned, namely:—Fifteen Hundred Dollars ($1500.00) per annum for the rest of the period of said lease of March 12, 1895, in semi-annual installments of Seven Hundred and Fifty ($750.00) Dollars each, beginning on the 1st day of May, 1911. To pay to the State in addition to the sums hereinbefore mentioned, the sum of Three Hundred and Seventy-five ($375.00) Dollars per quarter, beginning on the 10th day of April, 1911, for each three (3) months of continous hydraulic service rendered by the State to the Company, under the terms of said lease of March 12, 1895, and this supplementary agreement, during which time a flow of water to the depth of six (6) inches over the top of the Company's weir shall be maintained without interruption continuing longer than six (6) consecutive hours. Proof of such interruption may be made by any officer of the Company and at least one (1) other disinterested citizen having knowledge of the facts.

Eighth. All payments except premium payments for uninterrupted service, shall be made subject to all of the provisions specified in said lease of March 12, 1895.

Ninth. This agreement shall continue and be in force until the 12th day of March, 1925, unless sooner terminated by default on the part of the company.

Tenth. A cancellation of said lease of March 12, 1895, for any cause whatsoever, shall work a cancellation of all the obligations on this supplementary agreement.

In witness wherof, the parties hereto have executed this agreement the day and year first above written.

(Signed) Geo. W. Watkins, B. W. Baldwin, Wm. Kirtley, Jr., Members of the Board of Public Works of the State of Ohio. The Maumee Valley Electric Company, by (Signed) J. M. Ashley, President.

I hereby certify the above to be a correct copy.

(Signed) J. M. Ashley.

[fol. 89] STIP. EX. 3

Lease of Water Power from the State of Ohio to Thos. W. Studer

The Maumee Valley Electric Co. (by Transfer)

[fol. 90] This agreement, made this 13th day of November, 1906, between the State of Ohio, party of the first part, by the Board of Public Works thereto duly authorized by law, made in pursuance thereof, and Thomas W. Studer, party of the second part,

Witnesseth: That said party of the first part, in consideration of the rents reserved and the covenants of the party of the second part hereinafter contained and upon the express condition that the party of the second part shall continue during the whole of his term to comply with all and singular the limitations and conditions hereinafter contained, and shall, in every respect, perform all the stipulations of this agrement by said party to be performed, agrees to sell and lease to said party of the second part, for the term of thirty years, from and after the first day of November, 1906, subject to the restrictions, limitations and conditions herein contained, the use and occupation of twenty-one hundred cubic feet of water per minute to be used in a grist mill and electric power plant or other machinery which may be approved by the Board of Public Works, the water hereby leased to be taken out of the level of the Miami & Erie Canal, Waterville, Ohio, and to be conveyed to the mills or other hydraulic works over a regulating weir, to be constructed by and at the expense of the party of the second part as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, agrees to pay to said state the yearly rent or sum of four hundred and fifty ($450.00) dollars provided the party of the second part shall not be deprived of the use thereof for more than one month in the aggregate, in any one year. And if for the purpose of repairing the Canal, preventing breaches, removing bars, or other obstructions, or making any improvements to the Canal or works connected therewith, or in consequence of breaches or the in-

adequacy of the supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the water power hereby leased, so as to prevent the operation of any hydraulic works usually propelled by the water power hereby leased, such deduction shall be made from the rent accruing on such portion of [fol. 91] the water power as the said party is so prevented from using, as will bear the same proportion to the yearly rent thereof, that the excess of time over one month during which said party has been deprived of its use, bears to eleven months, the rent to be paid semi-annually, on the first day of May and November in each and every year, during the continuance of this lease, to the Collector of Canal Tolls, at Toledo, Ohio, or other Agent of the State authorized to receive the same.

And the said party of the second part further agrees to erect, at his own expense, in a good, secure, substantial and workmanlike manner, the regulating weir above mentioned, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a plan to be furnished by the Board of Public Works or Engineer employed on any adjoining part of the Canal, and under the direction and subject to the inspection of the Board of Public Works or such Engineer; the weir over which the water is drawn from the Canal to be so placed and formed that the top of the weir shall not be more than six inches below the level, at which it shall be designed to sustain the surface of the water in that part of the canal from whence the water is to be drawn; and of such length and otherwise so constructed that a uniform quantity of water will flow from the upper to the lower levels of the Canal, whether the hydraulic works are in operation or not.

And said party of the second part further agrees so to construct the head race, tail race, and other works and devices conected with the use of water hereby leased.

And the said party of the second part further agrees, during the continuance of this lease, to keep constantly in good order and repair the weir, head and tail race, and all other works and devices connected with the use of the water hereby leased, so far as the same shall be necessary to secure the regular and uniform flow of water from the

upper to the lower level, and also to prevent any breach in the bank, the formation of a bar or other injury to the Canal, or impediment to the navigation thereof; and if, nevertheless, any such breach, bar, or other injury or impediment should occur in consequence of any of said works [fol. 92] not being faithfully and substantially constructed, or being suffered to be out of repair, then said party of the second part shall, on being notified thereof by said Board of Public Works, Engineer, or other proper Agent of the State, immediately repair said breach or other injury; or if such Agent of the State shall cause the same to be done, (which he is hereby authorized at his option to do), then said party of the second part shall pay to said Agent all necessary expenses incurred in repairing such breach or other injury, on demand.

It is expressly understood and agreed, by and between the parties, that for the purpose of preventing or repairing breaches, removing bars or other obstructions to the navigation of the Canal, or for the purpose of making any improvements in the Canal, or the works or devices connected therewith, any authorized Agent of the party of the first part, may cause the water to be drawn, either partially or wholly out of the Canal, and to remain so drawn out so long as may be necessary for any of the aforesaid purposes; and the said party of the second part shall not be entitled to any deduction from the rent hereby made payable, unless said party shall thereby be deprived of the use of the water for more than one month in any one year; and the party of the first part reserved the right to resume, at any time, the use of the water hereby leased, whenever the same shall become necessary for the purpose of navigation, and to continue the use thereof so long as the same shall be necessary for the purpose aforesaid; and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the whole thereof for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privilege, (which fact shall be determined by three judicious, disinterested freeholders, one to be chosen by the Board of Public Works, or other authorized Agent of the State, one by the party of the Second part, and the third by the two thus chosen,) then the party of the second part shall be from such time ab-

solved from all further liabilities growing — of this agreement.

[fol. 93] And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years for such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided, such buildings shall be erected on land belonging to the State, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease.

It is further understood and agreed, that said party of the second part shall not sell, assign or transfer his right or interest derived from this agreement, or any part thereof, to any person or persons, unless the assent of some authorized Agent of the State shall be first obtained therefor in writing.

And if, at any time, any installment which shall become due for rent as hereinbefore expressed, shall remain unpaid for one month from the time the same shall fall due, or if the party of the second part shall, in any respect, fail to fulfill and perform all the engagements of said party hereinbefore expressed, or shall do, or permit to be done, any act or thing hereby prohibited, or shall, in any respect, violate this agreement, then, and in either case, all the rights and privileges derivable to said party from this agreement, shall from the time of such failure or violation cease and determine; and any authorized Agent of the State or lessee under said State, shall have full right and power to enter upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part; and said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

[fol. 94] And it is further understood and agreed, that the Board of Public Works, Engineer, or any other authorized Agent of the State, may at any time, enter upon the premises hereby leased, to construct and put in a gauge, of such size as will measure the water leased, in such manner and place as may be deemed advisable within the head race or fore-bay—the party of the second part to be at the expense of furnishing and putting in the water gauge.

This lease is made in lieu of one made to the said second party September 13th, 1904, which lease is hereby cancelled and annulled.

In testimony whereof, The parties executed this agreement the day and year first above written.

Signed, Sealed and Delivered in presence of

George H. Watkins (Seal), W. Kirtley, Jr. (Seal), Members of Board. Thomas W. Studer, Lessee.

In case of assignment of the foregoing lease, the following form must be filled up and signed by the several parties, to-wit:

Fremont, Ohio, October 22, 1909.

We, and each of us, do hereby agree that in consideration of one dollar I do hereby assign and does hereby assign, sell, and convey to Luther Gibbs, his heirs and assigns, all his right, title and interest in and to the foregoing lease of water power and lands, together with the appurtenances belonging to the same, subject to all the stipulations, restrictions, and limitations in said lease provided. And said Luther Gibbs hereby and herein agrees to assume all the responsibilities and obligations imposed by said lease upon said Thomas W. Studer or the original party of the second part to said contract of lease.

Thomas W. Studer. (L. S.)

Office of the State Board of Public Works, Columbus, Ohio

January 11th, 1910.

By resolution adopted by the Board of Public Works on the 11th day of January, 1910, the within lease was assigned to Luther Gibbs of Fremont, Ohio.

Charles W. Diehl, Secretary.

[fol. 95] Fremont, Ohio, July 17th, 1912.

For a valuable consideration, I hereby sell, assign and transfer all my right, title and interest in and to the within lease and privilege to Mary Serrick.

Luther Gibbs.

Columbus, Ohio, Oct. 8th, 1912.

By resolution of the Board of Public Works passed on the 8th day of October, 1912, the above assignment was approved.

Charles W. Diehl, Secretary.

Toledo, Ohio, Nov. 24, 1913.

For One Dollar ($1.00) and other valuable considerations, to me in hand paid, the receipt whereof is hereby acknowledged, I, Mary Serrick, hereby sell, transfer and assign to The Maumee Valley Electric Company, from whom said consideration was received, all my right, title and interest in and to the within Lease of Water Power and all the privileges therein mentioned, and I hereby request and authorize the Superintendent of Public Works of Ohio to transfer and record this assignment upon the records of the Department of Public Works of Ohio.

Mary Serrick.

Columbus, Ohio, Dec. 11, 1913.

The above transfer is hereby approved.

John S. Miller, Superintendent of Public Works.

Witnessed by Carl J. Lindecker, Charles H. Hoffman.

[fol. 96] Stip. Ex. 4

This agreement, Made this Eighth day of April, 1903, between the State of Ohio, party of the first part, by the Board of Public Works thereto duly authorized by law, made in pursuance thereof, and A. C. Tryon, party of the second part, Witnesseth:

That said party of the first part, in consideration of the rents reserved and the covenants of the party of the second

part hereinafter contained and upon the express condition that the party of the second part shall continue during the whole of his term to comply with all and singular the limitations and conditions hereinafter contained, and shall, in every respect, perform all the stipulations of this agreement by said party to be performed, agrees to sell and lease to said party of the second part, for the term of 30 years, from and after the first day of May, 1903, subject to the restrictions, limitations and conditions herein contained, the use and occupation of a water power in Maumee City, said privilege to consist in the use of the water to which Reynolds and Browns are entitled to at their mill—the quantity being (2,050) two thousand fifty cubic feet per minute. The said water to be used after passing the mill of Mitchell and Brown and the mill of the South Toledo Paper Company and will be used at the third fall on the same race. The water hereby leased to be taken out of the level of the Miami & Erie Canal in Maumee City, and to be conveyed to the mills or other hydraulic works over a regulating weir, to be constructed by, and at the expense of the party of the second part as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, agrees to pay to said State the yearly rent or sum of $300 in advance provided the party of the second part shall not be deprived of the use thereof for more than one month in the aggregate, in any one year. And if for the purpose of repairing the Canal, preventing breaches, removing bars, or other obstructions, or making any improvements to the Canal or works connected therewith, or in consequence of breaches or the inadequacy of the supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the water power hereby leased, so as to prevent the operation of any dydraulic works usually propelled by the water power hereby leased, such deduction shall be made from the rent accruing on such portion of the water power as the said party is so prevented from using, as will bear the same proportion to the yearly rent thereof, as the time during which the said party has been deprived of its use, bears to eleven months; the rent to be paid semi-annually on the first day of May and November in each and every

year, during the continuance of this lease, to the Collector of Canal Tolls, at Toledo, Ohio, or other Agent of the State authorized to receive the same.

And the said party of the second part further agrees to erect, at his own expense, in a good, secure, substantial and workmanlike manner, the regulating weir above mentioned, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a plan to be furnished by the Board of Public Works or Engineer employed on any adjoining part of the Canal, and under the direction and subject to the inspection of the Board of Public Works or such Engineer; the weir over which the water is drawn from the Canal to be so placed and formed that the top of the weir shall not be more than six inches below the level, at which it shall be designed to sustain the surface of the water in the part of the Canal from whence the water is to be drawn; and of such length and otherwise so constructed that a uniform quantity of water will flow from the upper to the lower levels of the Canal, whether the hydraulic works are in operation or not.

And it is further expressly agreed that the party of the second part shall not, for any purpose or in any manner whatever, obstruct the equal and regular flow of water from one level of the Canal to another, nor increase the [fol. 97] flow, nor cause the water, or any part thereof to flow out of the Canal; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in or about the mills or hydraulic works propelled by water hereby leased. And said party of the second part shall be considered and held responsible for keeping the regulating weirs above described constantly in good repair and free from all obstructions; and a failure to do so or an interference with the flow of water on their part, or on the part of any person employed in or about said mills or hydraulic works aforesaid, shall be adjudged a forfeiture of this lease, and of all the rights and privileges of the said party growing out of this agreement.

And said party of the second part further agrees so to construct the head race, tail race, and other works and devices connected with the use of water hereby leased, that

said water will, at all times, return into the Canal, after being used for hydraulic purposes, at some convenient and proper place to be designated therefor by said Board of Public Works, Engineer or other authorized Agent of the State on the level next below in such manner as not to carry deposit into the Canal, nor obstruct the navigation thereof; and also that a regular and uniform quantity of water may, at all times, flow from the upper to the lower levels of the Canal.

And the said party of the second part further agrees, during the continuance of this lease, to keep constantly in good order and repair the weir, head and tail race, and all other works and devices connected with the use of the water hereby leased, so far as the same shall be necessary to secure the regular and uniform flow of water from the upper to the lower levels, and also to prevent any breach in the bank, the formation of a bar or other injury to the Canal, or impediment to the navigation thereof; and if, nevertheless, any such breach, bar, or other injury or impediment should occur in consequence of any of said works not being faithfully and substantially constructed, or being suffered to be out of repair, then said party of the second part shall, on being notified thereof by said Board of Public Works, Engineer, or other proper Agent of the State, immediately repair said breach or other injury; or if such Agent of the State shall cause the same to be done, (which he is hereby authorized at his option to do), then said party of the second part shall pay to said Agent all necessary expenses incurred in repairing such breach or other injury, on demand.

It is expressly understood and agreed, by and between the parties, that for the purpose of preventing or repairing breaches, removing bars or other obstructions to the navigation of the Canal, or for the purpose of making any improvements in the Canal, or the works or devices connected therewith, any authorized Agent of the party of the first part, may cause the water to be drawn, either partially or wholly out of the Canal, and to remain so drawn out so long as may be necessary for any of the aforesaid purposes; and the said party of the second part shall not be entitled to any deduction from the rent hereby made

payable, unless said party shall thereby be deprived of the use of the water for more than one month in any one year; and the party of the first part reserves the right to resume, at any time, the use of the water hereby leased, whenever the same shall become necessary for the purposes of navigation, and to continue the use thereof so long as the same shall be necessary for the purpose aforesaid; and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the whole thereof for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privelege, (which fact shall be determind by three judicious, disinterested freeholders, one to be chosen by the Board of Public Works, or other authorized Agent of the State, one by the party of the second part, and the third by the two thus chosen,) then the party of the second part shall be from such time absolved from all further liabilities growing of this agreement.

And it is further understood and agreed, that at the ex- [fol. 98] piration of this agrement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided, such buildings shall be erected on land belonging to the State, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease.

And it is further understood and agreed, that the water power hereby leased, shall not be used to drive or propel any saw mill, or other machinery or other works, from which saw dust, chips or other rubbish will be likely to be carried, thrown, or floated into the Canal, so as to form bars or other obstructions to the navigation in the Canal, or to clog the gates, waste weirs or regulating weirs, or

otherwise injure or obstruct the same. And the party of the second part shall, at all times, be bound to keep the Canal clear of all rubbish or other obstruction consequent, in any manner, on the use of the water hereby leased, or of the works or machinery erected therefor.

And said party of the first part, in consideration of the rents and agreements hereinbefore specified, further agrees to lease to the party of the second part, upon the same conditions, and subject to the same limitations and restrictions herein contained, all that certain piece or parcel of land, situate.

* * * * * * *

It is understood and agreed between the parties that the party of the first part hereby leases for the term of 30 years from and after the first day of May, 1903 all the State land abutting the powers hereby leased and *not* included in the lease to the Paper Mill and below it on the side cut in Maumee City which belongs to the State, and the party of the second part agrees to furnish at his own expense all further and necessary land that may be required for use the power hereby leased, to enable the party of the second part to use and enjoy the use of the water power hereby leased, for the like term of 30 years from the first day of May, 1903.

It is further understood and agreed, that said party of the second part shall not sell, assign or transfer his right or interest derived from this agreement, or any part thereof, to any person or persons, unless the assent of some authorized Agent of the State shall be first obtained therefor in writing.

And if, at any time, any installment which shall become due for rent as hereinbefore expressed, shall remain unpaid for one month from the time the same shall fall due, or if the party of the second part shall, in any respect, fail to fulfill and perform all the engagements of said party hereinbefore expressed, or shall do, or permit to be done, any act or thing hereby prohibited, or shall, in any respect, violate this agreement, then, and in either case, all the rights and privileges derivable to said party from this agreement, shall from the time of such failure or violation cease and determine; and any authorized Agent of the State or lessee under said State, shall have full right and power to enter

upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part; and said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

And it is further understood and agreed, that the Board of Public Works, Engineer, or any other authorized Agent of the State, may at any time, enter upon the premises hereby leased, to construct and put in a guage, of such size as will measure the water leased, in such manner and place as may be deemed advisable within the head race or forebay—the party of the second part to be at the expense of [fol. 99] furnishing and putting in the water gauge.

This lease is made in lieu of one granted the said second party for 30 years from November 1st, 1899, which lease is hereby annulled and cancelled.

In testimony whereof, The parties executed this agreement the day and year first above written.

Signed, sealed and delivered in presence of

(Sgd.) W. G. Johnston, (Seal), W. Kirtley, Jr. (Seal), Members of Board. (Sgd.) A. C. Tryon, Lessee.

The Board of Public Works of Ohio at a regular meeting held Tuesday, Sept. 13th, 1904, authorized the transfer of this lease to The Maumee Electric Co. as shown on page 57, Record Book #13.

Witness my hand and the seal of said board this 13th day of October, A. D. 1904.

W. H. McCluitrick, Secy. B. P. Wks. of Ohio. (Seal.)

[fol. 100] STIP. EX. 5

This agreement, Made this eighth day of April, 1903, between the State of Ohio, party of the first part, by the Board of Public Works thereto duly authorized by law, made in pursuance thereof, and The Maumee Paper Company, party of the second part, Witnesseth: That said party of the first part, in consideration of the rents reserved and the covenants of the party of the second part hereinafter contained and upon the express condition that the party of the second

part shall continue during the whole of its term to comply with all and singular the limitations and conditions hereinafter contained, and shall, in every respect, perform all the stipulations of this agreement by said party to be performed, agrees to sell and lease to said party of the second part, for the term of Thirty (30) years, from and after the first day of May, 1903, subject to the restrictions, limitations and conditions herein contained, the use and occupation of a water power in South Toledo. Said privilege to consist in the use of the water to which the mill next above is entitled being two thousand and fifty (2050) cubic feet per minute, and to be used after passing the mill above, this being the second fall from the Miami and Erie canal and to be of equal descent to that at either of other falls on the race, the water hereby leased to be taken out of the level of the Miami and Erie Canal in South Toledo, by way of the next mill above summit, and to be conveyed to the mills or other hydraulic works over a regulating weir, to be constructed by, and at the expense of the party of the second part as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, agree to pay to said State the yearly rent or sum of Four Hundred ($400.00) dollars in advance provided the party of the second part shall not be deprived of the use thereof for more than one month in the aggregate, in any one year. And if for the purpose of repairing the Canal, preventing breaches, removing bars, or other obstructions, or making any improvements to the Canal or works connected therewith, or in consequence of breaches or the inadequacy of the supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the water power hereby leased, so as to [fol. 101] prevent the operation of any hydraulic works usually propelled by the water power hereby leased, such deduction shall be made from the rent accruing on such portion of the water power as the said party is so prevented from using, as will bear the same proportion to the yearly rent thereof, as the time during which the said party has been deprived of its use, bears to eleven months; the rent to be paid semi-annually on the first day of May and November in each and every year, during the continuance of this

lease, to the Collector of Canal Tolls, at Toledo, Ohio, or other Agent of the State authorized to receive the same.

And the said party of the second part further agrees to erect, at his own expense, in a good, secure, substantial and workmanlike manner, the regulating weir above mentioned, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a plan to be furnished by the Board of Public Works or Engineer employed on any adjoining part of the canal, and under the direction and subject to the inspection of the Board of Public Works or such Engineer; the weir over which the water is drawn from the Canal to be so placed and formed that the top of the weir shall not be more than six inches below the level, at which it shall be designated to sustain the surface of the water in that part of the Canal from whence the water is to be drawn; and of such length and otherwise so constructed that a uniform quantity of water will flow from the upper to the lower levels of the Canal, whether the hydraulic works are in operation or not.

And it is further expressly agreed that the party of the second part shall not, for any purpose or in any manner whatever, obstruct the equal and regular flow of water from one level of the Canal to another, nor increase the flow, nor cause the water, or any part thereof to flow out of the Canal; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in or about the mills or hydraulic works propelled by water hereby leased. And said party of the [fol. 102] second part shall be considered and held responsible for keeping the regulating weirs above described constantly in good repair and free from all obstructions; and a failure to do so or an interference with the flow of water on their part, or on the part of any person employed in or about said mills or hydraulic works aforesaid, shall be adjudged a forfeiture of this lease, and of all the rights and privileges of the said party growing out of this agreement.

And said party of the second part further agrees so to construct the head race, tail race, and other works and devices connected with the use of water hereby leased, that said water will at all times, return into the Canal, after

being used for hydraulic purposes, at some convenient and proper place to be designated therefor by said Board of Public Works, Engineer or other authorized Agent of the State, on the level next below Lock No. — in such manner as not to carry deposit into the Canal, nor obstruct the navigation thereof; and also that a regular and uniform quantity of water may, at all times, flow from the upper to the lower levels of the Canal.

And the said party of the second part further agrees, during the continuance of this lease, to keep constantly in good order and repair the weir, head and tail race, and all other works and devices connected with the use of the water hereby leased, so far as the same shall be necessary to secure the regular and uniform flow of water from the upper to the lower levels, and also to prevent any breach in the bank, the formation of a bar or other injury to the Canal, or impediment to the navigation thereof; and if, nevertheless, any such breach, bar or other injury or impediment should occur in consequence of any of said works not being faithfully and substantially constructed, or being suffered to be out of repair, then said party of the second part shall, on being notified thereof by said Board of Public Works, Engineer, or other proper Agent of the State, immediately repair said breach or other injury; or if such Agent of the State shall cause the same to be done (which he is hereby [fol. 103] authorized at his option to do,) then said party of the second part shall pay to said Agent all necessary expenses incurred in repairing such breach or other injury on demand.

It is expressly understood and agreed, by and between the parties, that for the purpose of preventing or repairing breaches, removing bars or other obstructions to the navigation of the Canal, or for the purpose of making any improvements in the Canal, or the works or devices connected therewith, any authorized Agent of the party of the first part, may cause the water to be drawn, either partially or wholly out of the Canal, and to remain so drawn out so long as may be necessary for any of the aforesaid purposes; and the said party of the second part shall not be entitled to any deduction from the rent hereby made payable, unless said party shall thereby be deprived of the use of the water for more than one month in any one year; and the party of the

first part reserves the right to resume, at any time, the use of the water hereby leased, whenever the same shall become necessary for the purposes of navigation, and to continue the use thereof so long as the same shall be necessary for the purpose aforesaid; and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the whole thereof for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privilege, (which fact shall be determined by three judicious, disinterested freeholders, one to be chosen by the Board of Public Works, or other authorized Agent of the State, one by the party of the second part, and the third by the two thus chosen,) then the party of the second part shall be from such time absolved from all further liabilities growing — of this agreement.

And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient [fol. 104] use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided, such buildings shall be erected on land belonging to the State, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease.

And it is further understood and agreed, that the water power hereby leased, shall not be used to drive or propel any saw mill, or other machinery or other works, from which saw dust, chips or other rubbish will be likely to be carried, thrown, or floated into the Canal, so as to form bars or other obstructions to the navigation in the Canal, or to clog the gates, waste weirs or regulating weirs, or otherwise injure or obstruct the same. And the party of the second part shall at all times, be bound to keep the

Canal clear of all rubbish or other obstruction consequent, in any manner, on the use of the water hereby leased, or of the works or machinery erected therefor.

And the said party of the first part, in consideration of the rents and agreements hereinbefore specified, further agrees to lease to the party of the second part, upon the same conditions, and subject to the same limitations and restrictions herein contained, all that certain piece or parcel of land, situate, butted, bounded and described as follows:

It is understood and agreed between the parties that the party of the first part hereby leases for the term of thirty (30) years from the first day of May, 1903, all the land adjoining and abutting the power hereby leased and included in the lease to Stadden and Company and below them and on South Toledo Side Cut, which belongs to the State, and the party of the second part agrees to furnish at their own expense all further and necessary land that may be required for the use of the power hereby leased, to enable the party of the second part to use and enjoy the use of the water power hereby leased, for the like term of [fol. 105] thirty (30) years from the first day of May, 1903.

It is further understood and agreed, that said party of the second part shall not sell, assign or transfer his right or interest derived from this agreement, or any part thereof, to any person or persons, unless the assent of some authorized Agent of the State shall be first obtained therefor in writing.

And if at any time, any installment which shall become due for rent as hereinbefore expressed, shall remain unpaid for one month from the time the same shall fall due, or if the party of the second part shall, in any respect, fail to fulfill and perform all the engagements of said party hereinbefore expressed, or shall do, or permit to be done, any act or thing hereby prohibited, or shall, in any respect, violate this agreement, then, and in either case, all the rights and privileges derivable to said party from this agreement, shall from the time of such failure or violation cease and determine; and any Authorized Agent of the State or lessee under said State, shall have full right and power to enter upon and take possession of the premises, and resume all the rights and privileges hereby

granted to the party of the second part; and said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

And it is further understood and agreed, that the Board of Public Works, Engineer, or any other authorized Agent of the State, may at any time, enter upon the premises hereby leased, to construct and put in a gauge, of such size as will measure the water leased, in such manner and place as may be deemed advisable, within the head race or fore-bay the party of the second part to be at the expense of furnishing and putting in the water gauge.

This lease is made in lieu of one made to the said second party for a term of thirty (30) years, from and after November 1st, 1886, which lease is hereby annulled and cancelled.

In testimony whereof, The parties executed this agreement the day and year first above written.

Signed, Sealed and Delivered in presence of

W. G. Johnston (Seal), W. Kirtley, Jr. (Seal), Members of Board. The Maumee Paper Co., B. S. Boyer, Sec'y, Lessee.

[fol. 106] Assignment

Toledo, Ohio, Sept. 23, 1912.

We, and each of us, do hereby agree, that in consideration of one dollar, the Maumee Electric Company assigns, and does hereby assign, sell, and convey to William H. Sandford, as Trustee for The Valley Light & Power Company, a corporation about to be organized under the laws of the State of Ohio, his heirs and assigns, all its right, title and interest in and to the foregoing lease of water power and lands, dated April 8th, 1903, originally held by The Maumee Paper Company, and covering the use of 2050 cubic feet of water of the Miami & Erie Canal, together with the appurtenances belonging to the same, subject to all the stipulations, restrictions, and limitations in said lease provided. And said William H. Sandford as Trustee, hereby and herein agrees to assume all the responsibilities and obligations imposed by said lease upon said The Maumee Electric Company, or the original party of the second part to said contract of lease, and said Sandford further

agrees to formally assign said lease to said The Valley Light & Power Company immediately upon its incorporation; this assignment being made expressly subject to the approval of the Board of Public Works, to be herein under written.

The Maumee Electric Company, by F. W. Bainbridge, President.

Office of the State Board of Public Works, Columbus, Ohio

September 24, 1912.

By resolution of the Board of Public Works adopted on the 24th day of September, 1912, the within water power lease was assigned to William H. Sandford, as trustee for The Valley Light & Power Company.

Chas. W. Dichl, Sec'y. (Seal.)

[fol. 107] STIP. EX. 6

Lease of Water Power to George K. Detwiler

Dated February 20th, 1901

Rents Payable at Toledo, Ohio, Miami and Erie Canal

[fol. 108] This agreement, made this 20th day of February, 1901, between the State of Ohio, party of the first part, by Frank A. Huffman, Acting Commissioner of the Board of Public Works, thereto duly authorized by law, and by the order of the Board of Public Works made in pursuance thereof, and George K. Detwiler, party of the second part, Witnesseth: That said party of the first part, in consideration of the rents reserved, and the covenants of the party of the second part hereinafter contained, and upon the express condition that the party of the second part shall continue during the whole of his term to comply with all and singular the limitations and conditions hereinafter contained, and shall in every respect perform all the stipulations of this agreement by said party to be performed agrees to sell and lease to said party of the second part, for the term of thirty (30) years, from and after the first

day of May, 1901, subject to the restrictions, limitations and conditions herein contained, the use and occupation of such quantity of water if used at the location of the water power formerly occupied by Robert A. Forsythe and later by Raynor, Seagraves and Company as will produce forty horse-power, which quantity of water is estimated to be eight hundred and thirty-three (833) cubic feet per minute over a fall of thirty-two (32) feet. This being a renewal of lease of water formerly leased at the above named location. The water hereby leased to be taken out of the level of the Miami and Erie Canal next above the Miami Lock at the above named location or such other point as may be agreed upon by the parties herein named or their assigns, and to be conveyed to the mills or hydraulic works from between two regulating weirs, to be constructed by and at the expense of the party of the second party as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, agrees to pay to said State the yearly rent or sum of Three hundred and twenty ($320.00) dollars, in advance, provided the party of the second part shall not be deprived [fol. 109] of the use thereof for more than one month in the aggregate, in any one year. And if for the purpose of repairing the Canal, preventing breaches, removing bars, or other obstructions, or making any improvements to the Canal or works connected therewith, or in consequence of breaches or the inadequacy of the supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the water power hereby leased, so as to prevent the operation of any hydraulic works usually propelled by the water power hereby leased, such deduction shall be made from the rent accruing on such portion of the water power as the said party is so prevented from using, as will bear the same proportion to the yearly rent thereof, as the time during which the said party has been deprived of its use, bears to eleven months; the rent to be paid semi-annually, in advance, on the first day of May and November in each and every year, during the continuance of this lease, to the Collector of Canal Tolls, at Toledo, Ohio, or other Agent of the State authorized to receive the same.

And the said party of the second part further agrees to erect, at his own expense, in a good, secure, substantial and workman-like manner, the regulating weirs above mentioned, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a plan to be furnished by the Acting Commissioner or Engineer employed on any adjoining part of the Canal, and under the direction and subject to the inspection of such Acting Commissioner or Engineer; the weir over which the water is drawn over the Canal to be so placed and formed that the top of the weir shall not be over six inches below the level at which it shall be designated to sustain the surface of the water in that part of the Canal from whence the water is to be drawn; and the other, or second weir, to be so placed and formed that the top thereof will be at least one inch lower than the top of the weir over which the water is drawn from the Canal and of such length and otherwise so constructed that a [fol. 110] uniform quantity of water will flow from the upper to the lower levels of the Canal, whether the hydraulic works are in operation or not.

And it is further expressly agreed that the party of the second part shall not for any purpose or in any manner whatever obstruct the equal and regular flow of water from one level of the Canal to another, nor increase the flow, nor cause the water, or any part thereof, to flow out of the Canal; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in or about the mills or hydraulic works propelled by water hereby leased. And said party of the second part shall be considered and held responsible for keeping the regulating weirs above described, constantly in good repair, and free from all obstructions; and a failure to do so, or an interference with the flow of water on their part, or on the part of any person employed in or about said mills or hydraulic works aforesaid, shall be adjudged a forfeiture of this lease, and of all the rights and privileges of the said party growing out of this agreement.

And the said party of the second part further agrees so to construct the head race, tail race, and other works and devices connected with the use of water hereby leased.

And the said party of the second part further agrees, during the continuance of this lease, to keep constantly in good order and repair the weirs, head and tail race, and all other works and devices connected with the use of the water hereby leased, so far as the same shall be necessary to secure the regular and uniform flow of water from the upper to the lower levels, and also to prevent any breach in the bank, and the formation of a bar or other injury to the Canal, or impediment to the navigation thereof; and if, nevertheless, any such breach, bar or other injury or impediment should occur in consequence of any of said works not being faithfully and substantially constructed, or being suffered to be out of repair, then said party of the second part shall, on being notified thereof by said Acting Commissioner, Engineer, or other proper Agent of the State, immediately repair said breach or other injury; or if such [fol. 111] Agent of the State shall cause the same to be done (which he is hereby authorized at his option to do), then said party of the second part shall pay to said Agent all necessary expenses incurred in repairing such breach or other injury on demand.

It is expressly understood and agreed, by and between said parties, that for the purpose of preventing or repairing breaches, removing bars or other obstructions to the navigation of the Canal, or for the purpose of making any improvements in the Canal, or the works or devices connected therewith, any authorized Agent of the party of the first part may cause the water to be drawn, either partially or wholly out of the Canal, and to remain so drawn out so long as may be necessary for any of the aforesaid purposes; and the said party of the second part shall not be entitled to any deduction from the rent hereby made payable, unless said party shall thereby be deprived of the use of the water for more than one month in any one year; and the party of the first part reserves the right to resume at any time the use of the water hereby leased, whenever the same shall become necessary for the purpose of navigation, and to continue the use thereof so long as the same shall be necessary for the purpose aforesaid; and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the

whole thereof for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privilege, (which fact shall be determined by three judicious, disinterested freeholders, one to be chosen by the Acting Commissioner, or other authorized Agent of the State, one by the party of the second part, and the third by the two thus chosen,) then the party of the second part shall be from such time absolved from all further liabilities growing out of this agreement.

And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase [fol. 112] of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such prices as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided such buildings shall be erected on land belonging to the State, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease.

And — is further understood and agreed, that the water power hereby leased shall not be used to drive or propel any saw mill, or other machinery or other works, from which saw dust, chips or other rubbish will be likely to be carried, thrown, or floated into the Canal, so as to form bars or other obstructions to the navigation in the Canal, or to clog the gates, waste weirs or regulating weirs, or otherwise injure or obstruct the same. And the party of the second part shall at all times be bound to keep the Canal clear of all rubbish or other obstructions consequent, in any manner, on the use of the water hereby leased, or of the works or machinery erected therefor.

And said party of the second part, in consideration of the rents and agreements hereinbefore specified, further agrees to furnish their own land on which to use the water leased as aforesaid, without any claim for deduction of rent

therefor to enable the party of the second part to use and enjoy the use of the water power hereby leased; for the like term of thirty (30) years from the first day of May, 1901.

It is further understood and agreed, that said party of the second part shall not sell, assign or transfer his right or interest derived from this agreement, or any part thereof, to any person or persons, unless the assent of same authorized Agent of the State shall first be obtained therefor in writing.

[fol. 113] And if at any time, any installment which shall become due for rent as hereinbefore expressed, shall remain unpaid for one month from the time the same shall fall due, or if the party of the second part shall in any respect fail to fulfill and perform all the engagements of said party hereinbefore expressed, or shall do, or permit to be done, any act or thing hereby prohibited, or shall in any respect violate this agreement, then, and in either case, all the rights and privileges derivable to said party from this agreement shall, from the time of such failure or violation, cease and determine; and any authorized Agent of the State, shall have full right and power to enter upon and take possession of the premises and resume all the rights and privileges hereby granted to the party of the second part; and said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

In testimony whereof, The parties executed this agreement the day and year first above written.

(Sgd.) Frank A. Huffman. (Seal.) Geo. K. Detwiler. (Seal.)

Signed, Sealed and Delivered in presence of (Sgd.) Samuel Bachtell.

[fol. 114] For value received I hereby assign, sell and transfer and set over unto The Maumee Valley Electric Company all my right, title and interest in, to, and under the within lease September 20, 1909.

(Sgd.) Geo. K. Detwiler.

In the presence of (Sgd.) Eliot Norton, Edward M. Fries.

Transferred to the Maumee Valley Electric Co.

STATE OF OHIO,
Lucas County, ss:

Be it remembered, that on the 29th day of April, 1910, before me, the subscriber, a Notary Public, in and for said county, personally came Geo. K. Detwiler, the assignor in the foregoing conveyance and acknowledged the signing thereof to be his voluntary act and deed for the purposes therein mentioned.

(Sgd.) George H. Beckwith, Notary Public, Lucas Co., Ohio. (Seal.)

Columbus, Ohio, January 25, 1916.

The transfer of the within lease from George K. Detwiler to The Maumee Valley Electric Company of Toledo, Ohio, dated September 20th, 1909, was this day approved.

(Sgd.) Frank P. Hamer, Superintendent of Public Works.

[fol. 115] STIP. EX. 7

Whereas the State of Ohio in the construction of The Wabash and Erie Canal, has erected a dam across the Maumee River at the head of the Grand Rapid, a short distance above the property and hydraulic power of James Purdy situate on said River, for the purpose of diverting the water into said Canal, as well for navigation as to lease the same for hydraulic purposes, thereby diverting the water from the natural channel and from the hydraulic works of said Purdy; Therefore, this indenture made this eighth day of December, 1845, between the State of Ohio, by her agents the Board of Public Works of the one part and James Purdy of Mansfield, Ohio, of the other part, witnesseth, That the said Purdy for the consideration hereinafter stated, releases and forever quit claims to the State of Ohio, her lessees and assigns, his right and interest as riparian proprietor to the use of the water in the Maumee River flowing over the Grand Rapid, over and alongside of his property in and near the town of Gilead in Wood County, Ohio. That is so much thereof as said State may choose to divert and lease for hydraulic purposes, provided that said Purdy reserves and excepts from said conveyance

and reserves to his own use so much of said water to be taken from the pool of the dam aforesaid through the Canal herein described, in any quantity he may desire, during the seasons that the Canal is not navigable, until the water in the pool sinks to a level fifteen inches below the top of the dam at its present height in the north channel, and during the seasons of navigation until the water in the pool sinks to a level two inches below the top of the dam, and after it has been so drawn off than to use water sufficient to operate six pairs of four and one-half feet mill stones grinding each at the rate of one hundred and fifty bushels of wheat per 24 hours together with all machinery necessary in manufacturing flour until the water in the pool is reduced to a level six inches below the top of the dam and as much below that point as in the opinion of the Resident Engineer or other agent of the State in charge of the work it may be reduced without interruption to the navigation of the pool and Canal at that point with the heaviest ladened boats until the water in the pool is reduced to a level of eight inches below the top of the dam, [fol. 116] and said Purdy for himself and his assigns agrees to close or cause to be closed, any and all issues of water that may be in any mill, factory or other place when the same may be used, and continue the same closed at all times when the water is below the levels specified above, agreeably to the true intent and meaning of the foregoing resolutions. And on his or his assigns failing so to do the right is hereby conceded to the State by her authorized agents to enter and close and fasten the same doing no unnecessary damages to the mechanical structure connected therewith, until the water shall rise to a level entitling him or them to the use of the water as aforesaid.

In consideration of which the State of Ohio agrees to locate and construct a public navigable Canal from the pool aforesaid on the south shore of the river, to the head of said Purdy's Mill race in the town of Gilead and through the same to a point two hundred yards below the head thereof thirty feet wide at the bottom and four and one-half feet deep below the top of the dam, with a descent at the bottom of six inches in the whole length, with a slope in the banks of one foot nine inches base to one foot perpendicular, and construct in said canal a Guard Gate and other fixtures for

the security of the navigation and machinery connected with the Canal; and the said State of Ohio conveys and guarantees to said Purdy and his assigns forever, the right to receive through said Canal and use on his own land, the foregoing reserved quantity of water.

The State further agrees to lease no water on the Wabash and Erie Canal, between said pool and the town of Waterville, in addition to that which is now leased, and none on the Canal on the south side of the River except—What is hereby leased to said Purdy.

It is distinctly understood that this arrangement in no way affects said Purdy's right to damages for water taken by the State for navigation purposes. The foregoing arrangement and agreement is made and entered into by the parties thereto in pursuance of and under the joint resolution of the General Assembly of the State of Ohio, [fol. 117] passed March 12th, 1845, relative to the adjustment of the claim of James Purdy.

By order of the Board.

O. Follett, President. (Seal.) James Purdy. (Seal.)

In the presence of A. S. Galdwell, Wm. P. Reznor.

The State of Ohio,
Franklin County, ss:

Personally appeared before the subscriber, a Justice of the Peace in and for said County, the above named James Purdy and acknowledged the signing and sealing of the foregoing instrument to be his voluntary act and deed for the purpose therein specified.

December 8th, 1845.

A. Patton, J. P.

[fol. 118] Indenture Between the State of Ohio and James Purdy for Water Power

1845

Recorder's Office, Wood County, O.

Rec'd and Recorded March 10, 1846, in Book G, pp. 445 and 446.

P. Seamans, Recorder.

8/paid. Ex.

September 14, 1910.

I hereby certify that the foregoing is a true correct copy of a copy of the original certified by Charles W. Diehl, Secretary of State Board of Public Works, certification dated Columbus, Ohio, January 7th, 1910.

Henry C. Meyer, Notary Public, Kings County, New York. Certificate filed in N. Y. County.

[fol. 119] Stip. Ex. 8

Lease

State of Ohio

to

Peter Minor

Recorded in Record of Deeds and Leases M. & E. Canal, Office Ohio State B. P. W.

This agreement made this first day of September, A. D. 1842, between the State of Ohio, party of the first part, by R. Dickinson, Acting Commissioner and member of the Board of Public Works, thereto duly authorized by law, and by the order of the said Board made in pursuance thereof, and Peter Minor of the County of Lucas, and State aforesaid, party of the second part, Witnesseth: That said party of the first part, for and in consideration of the releases, quit claims, and covenants of the party of the second part, hereinafter contained and upon the express condition that the party of the second part shall continue, at all times, and forever, hereafter to comply with all and singular, the limitations, conditions and covenants hereinafter contained, and shall in every respect perform all the stipulations of this agreement by said party to be performed: Agrees to sell and convey, and does by these presents sell and convey to the said party of the second part, his heirs and assigns forever; subject to the limitations and conditions herein contained, a sufficient quantity of water properly applied, to propel eight pairs of four and a half feet mill stones,

with all the labor saving machinery necessary for the manufacture of superfine flour, to be applied at all seasons of the year; except when otherwise necessary for the navigation of the canal, or when breaches occur, repairs become necessary and other unavoidable causes prevent; provided that nothing herein contained shall hold the State of Ohio responsible to furnish the above amount of water or any part thereof to the said party of the second part, to the damage and injury of mill owners and proprietors of water power on the Maumee River at, opposite and below the towns of Providence and Gilead.

The water hereby leased for six of the said pairs of mill stones and their appertaining machinery, is to be taken from the Wabash and Erie Canal at and immediately above the Guard Lock, being Lock No. Nine, on said Canal and near the town of Providence on the North side of said Canal, by means of suitable regulating Gates, and to be discharged into the Canal below said Guard Lock, by means [fol. 120] of a suitable regulating weir, to be constructed in a safe, substantial and workmanlike manner, by and at the expense of the party of the first part, as hereinafter specified.

The water for the remaining two pairs of mill stones, and their appertaining machinery, is to be taken from the said Canal on its South side; and from the level immediately above said Guard Lock by means of a regulating weir, to be constructed by and at the expense of the party of the second part, as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, leased and conveyed as aforesaid, hereby releases, conveys and forever quit claims to the State of Ohio, and to her assigns forever, all right, title and interest, claim and demand of every kind whatever, against said State of Ohio, for the use and occupation of the water from the Maumee River for the occupation of all lands used and appropriated in the construction of the Wabash and Erie Canal and its appurtenances, for the occupation of all mill sites of the party of the second part, and for the destruction or injury of and to all mills, dams and mill races, and all other property either personal or real, which has been damaged, injured or destroyed in consequence of the construction of the said

Wabash and Erie Canal; excepting only the right to claim and receive an assessment of damages for the destruction of a saw mill, the property of the party of the second part, which stood on ground now occupied by said Canal.

And the said party of the first part hereby agrees, that the said State of Ohio shall erect and complete within eighteen months from the date hereof at the expense of the said State, in a secure, substantial and workmanlike manner, and keep in good repair, the regulating Gate, and weir above mentioned, to be constructed by the State, and to construct the same of stone walls of solid masonry and suitable timber and iron with the necessary embankments, agreeably to a place to be furnished by the Acting Commissioner or Engineer employed on said Canal or any adjoining portion thereof; and under the direction and subject to the inspection of such Acting Commissioner or Engineer; [fol. 121] the gates through which the water is to be drawn from the Canal to be so placed and formed that, together with weir below, they may at all times be readily made to secure a uniform and regular flow of water from the upper to the lower levels of the Canal according to the pleasure and discretion of the Acting Commissioner or Engineer, whether the hydraulic works are in operation or not.

And the said party of the second part further agrees to erect, complete and keep in good repair the regulating weir on the South side of the Canal, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a place to be furnished by the Acting Commissioner or Engineer employed on said Canal, or on any adjoining part thereof, and under the direction and subject to the inspection of such Acting Commissioner or Engineer; or to erect instead of the said weir, such feeder gate or gates, according to a plan to be furnished, as above, the work and material of which are to be approved of as above; and said gates when so constructed shall be under the control and management of such Acting Commissioner or Engineer. The weir or lower sill of the feeder gates over which the water is to pass from the Canal is to be so placed and formed that the top of the weir or lower sill of the feeder gates shall not be more than six inches below the level at which it shall be designed to

sustain the surface of the water in that part of the canal from whence the water is to be drawn. The said feeder gate or gates are to be so situate, so constructed that any duly authorized Agent of the State of Ohio may conveniently stop all the water from flowing through them, and that the quantity of water at any time to flow through them may conveniently be regulated in accordance with the intention of the parties to these presents and the description and direction of the Acting Commissioner or Engineer; the full right to direct, manage and control which, is hereby expressly reserved to the State of Ohio.

And it is further expressly agreed that the party of the second part shall not, for any purpose, or in any manner [fol. 122] whatever, obstruct the equal and regular flow of water from one line of the Canal to another, nor increase the flow, nor cause the water or any part thereof, to flow out of the Canal, except as hereinabove provided; nor shall the party of the second part permit any of said acts or things to be done by any persons employed in or about the mill or hydraulic works propelled by water hereby leased; and the said party of the second part shall be considered and held responsible for keeping the head races and regulating gates and weirs to be by him erected as above described, constantly in good repair and free from all obstructions; and a failure to do so or any interference with the flow of the water on their part, or on the part of any other person employed in or about said mills or hydraulic works aforesaid, shall be adjudged, and is hereby agreed to be determined a suspension of this lease, and of the rights and privileges of said party of the second part, growing out of this agreement, until the said party of the second part shall have paid to the proper Agent of the State of Ohio, all and singular the damages and costs of repairs which may have resulted from such failure or interference and furthermore have fully complied with these covenants.

And when at any time by the carelessness, neglect, or interference with the flow of water by the party of the second part or others in his employ, there shall occur any breach in the bank, the formation of a bar or other injury to the Canal, and also in case of the occurrence of any such injury or injuries in consequence of an unfaithful or unsubstantial

construction of any of the weirs, gates, embankments or other works to be constructed by the party of the second part, or in consequence of such said works being out of repair, then said party of the second part shall, on being notified thereof by said Acting Commissioner, Engineer or other proper Agent of the State, immediately repair said breach or other injury, or if such Agent of the State shall cause the same to be done (which he is hereby authorized at his option to do) then, said party of the second part shall pay to the said agent, all the necessary expenses incurred in repairing such breach or other injury on demand.

[fol. 123] And it is further understood and agreed that the water power hereby leased, or conveyed shall not be used to drive or propel any mill or other machinery of works, from which saw dust chips or other rubbish will be likely to be carried, thrown or floated into the Canal, so as to form obstructions to the navigation thereof, or to clog the gates, waste or regulating weirs, or otherwise injure or obstruct the same. And the said party of the second part shall at all times be bound to keep the Canal clear of all rubbish, or other obstructions consequent in any manner, on the use of the water hereby leased, and of the works and machinery erected therefor.

And if the party of the second part shall in any respect fail to fulfill and perform all the engagements of the said party hereinbefore expressed, or shall do, or permit to be done any act or thing hereby prohibited, or shall in any respect violate this agreement, then and in either case, all the rights and privileges derivable to said party of the second part from this agreement, shall from time of such violation, cease and determine until by some competent judicial judgment or decree such rights and privileges shall be duly restored; and any authorized Agent of the State shall have full power to enter upon and take possession of the premises and resume all the rights and privileges hereby granted to the party of the second part and hold the same until otherwise determined by a court of competent jurisdiction; and the said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

And it is further understood and agreed by the parties to this agreement that the head of water to be used by the

party of the second part as aforesaid to propel the six pairs of mill stones on the North side of said Canal is not to be less than four and a half feet, measuring from the surface of water above said Lock to the surface of water in Canal below the lock. And that the power for said two pairs of mill stones to be used on the South side of said Canal is to be so used to propel saw mills and is only to be used when there is a surplus of water in the Maumee River after supplying the Canal with water sufficient for the purposes of navigation and for all mills and other hydraulic [fol. 124] works that have been or may be hereafter leased from said State of Ohio. And it is further agreed that the regulating weir to regulate the flow of water from the Canal to the saw mill on the South side of the Canal as aforesaid, shall be constructed at the expense of the party of the first part, instead of the party of the second part as aforesaid, but ever thereafter to be kept in good repair by and at the expense of the second party.

In testimony whereof, the parties executed this agreement the day and year first above written.

R. Dickinson, Act. Com. of Board of Public Works.
(Seal.) Peter (his x mark) Minor.

Two witnesses.

Sept. 13, 1842.—Acknowledged by Peter Minor, before H. Corecreit, Justice of the Peace, Lucas County, Ohio.

[fol. 125] **Bond**

Peter Minor

to

The State of Ohio

Recorded in Record of Deeds and Leases M. & E. Canal, Office Ohio State Board of P. W.

Know all men by these presents, that I, Peter Minor of Lucas County, Ohio, am hereby held and firmly bound to the State of Ohio in the penal sum of Five Hundred Dollars, to which payment I bind myself, my heirs and assigns forever. Signed with my hand, and sealed with my seal this 15th day of July, 1846.

The conditions of the above obligation are that I hereby agree to convey to the State of Ohio within two months from this date a certain lot of ground, not exceeding one half acre agreeably to the terms of an agreement entered into between me and the State of Ohio, by the Board of Public Works, the payment for which I hereby acknowledge to have received in full. Said lot of ground to be laid off on the North Side of the Wabash and Erie Canal, near the head of the Maumee Rapids in Lucas County aforesaid, and to be bounded as follows: Beginning at a point in the North line of the towing path, one chain and sixty-nine above the head of the guard lock and running thence at right angles with the Canal north three and ½° east one chain and eighty-nine links; thence up the Canal parallel with the towing path for quantity.

(Signed) Peter (his x mark) Minor. (Seal.)

Two witnesses.

[fol. 126] Stip. Ex. 9

Monday, February 23, 1846.

Present: Messrs. Follett, Blickensderfer and Forrer.

Claim of Peter Minor

The Board proceeded under the Joint Resolution of the General Assembly, passed February 10, 1846, to examine the claim of Peter Minor, which resolution is in the words following:

"Resolved by the General Assembly of the State of Ohio, that the Board of Public Works are hereby authorized to examine the claim of Peter Minor, for the non-performance of a certain contract entered into by R. Dickinson, Acting Commissioner of the Board of Public Works with the said Minor, on the first day of September, one thousand eight hundred and forty-two, and all other matters in dispute between the State and the said Minor, and that they report to the Commissioners of the Canal Fund any further sum, which they may find due him, provided that the said Minor shall, before the investigation of his claim, execute and

deliver to the said Board a full and final release to the State of all further claims of any description, except so much as may be awarded to him by said Board under his resolution.

"Elias F. Drake," Speaker of the House of Representatives. "Seabury Ford," Speaker of the Senate."

February 10, 1846.

In pursuance of the requirements of the above Resolution the said Minor, on this day, filed with the Board, a full and final release to the State, duly executed; a copy of which release is here inserted, and is as follows:

"Know all men by these presents, that whereas, Peter Minor, did, on the first day of September, A. D. 1842, enter into an agreement with the State of Ohio, by R. Dickinson, Acting Commissioner, and Member of the Board of Public Works, by which, amongst other things, it was stipulated on the part of the said State of Ohio, that the said Peter [fol. 127] Minor, should relinquish to said State all right to claim damages for lapses consequent upon the construction of the Wabash and Erie Canal through his land and premises in Lucas County in said State, excepting a claim for the loss of a saw mill which occupied the site of the said canal; for which relinquishment, the said State would supply a water power to said Minor, upon his premises, sufficient to propel eight pairs of four feet and a half mill stones; and

Whereas, also, the General Assembly of the State of Ohio did on the 10th day of February, A. D. 1846, pass a resolution "authorizing the Board of Public Works to examine the claim of Peter Minor," a copy of which is hereto attached: (See copy of Resolution above)

Now, therefore, I, the said Peter Minor, in pursuance of said resolution, and in consideration of the sum of one dollar to me in hand paid, the receipt whereof, is hereby acknowledged, do hereby release, remise and forever quit claim unto the State of Ohio, all right, title and interest, estate and claim in and to the ground occupied by said canal and its appurtenances, and the easement necessary for the navigation thereof; and to all claims of damages for loss of water, and other losses of every kind, resulting from the

construction of said canal and appurtances, along, through, and over the premises and land owned by me, the said Peter Minor, and also on account of the inability of said State to supply the full amount of water power provided for in the contract aforesaid, To have and to hold the aforesaid rights and privileges unto the State of Ohio forever.

I moreover agree to receive as compensation in part for losses resulting from a deficiency in the quantity of water leased, any and all of the water which may pass around the guard lock from the level of the pool of the dam to the canal below the lock, together with the saw mill power provided for in the contract, and to receive a lease for the same on the term and conditions provided for in the contract aforesaid.

[fol. 128] In testimony whereof, I, the said Peter Minor, have hereto set my hand and seal this 23rd day of February A. D. 1846.

Peter (his x mark) Minor. (Seal.)

Signed, sealed and delivered in presence of A. B. Newburgh. B. B. Brown.

The State of Ohio,
Franklin County, ss:

Personally came before me, a Justice of the Peace, in and for said County, Peter Minor, grantor and releasor in the foregoing conveyance, and acknowledged the same to be his voluntary act and deed. Witnesseth my hand this 23rd day of Feb. A. D. 1846.

A. Patten, J. P."

Now for the purpose of more fully understanding the claim of said Peter Minor, which rests on the contract or agreement referred to in the resolution above cited, said contract is here inserted in full, and is in the words following, namely:

(Copy of said contract is Stipulation Exhibit No. 8 in this case.)

From the above contract, it will appear that the claim presented for the consideration of the Board, by the said Minor, under the resolution, consists in this: That the

agents of the State having failed from want of fall in the canal and other causes to furnish to the said Minor the water necessary to propel the six run of mill stones mentioned in said contract; and from due examination, it appearing that the total of water, which may be furnished to said Minor, "at and immediately above the Guard Lock, being Lock No. 9 on said canal, and near the town of Providence": does not exceed one and a half mill stone power.

The Board were constrained by the terms of the Resolution, in examining the claim of said Minor for this water, to place a cash value on the same, with a view of determining the amount said claim when offset against "other matters in dispute" between the State and said Minor, referred to in said Resolution.

[fol. 129] It will appear on reference to the terms of said contract, or agreement of Sept. 1, that in the releases of said Minor, in consideration of the grants on the part of the State, he expects and reserves "the right to claim and receive an assessment of damages for the destruction of a saw mill." This reservation from the knowledge possessed by the Board, of the ground occupied by the canal and the damage inflicted by its location on the property of said Minor, is understood to apply only to the mill, and not to the dam, or mill-race, or any other property connected with the use of the water at Providence. But, by reference to an award on this reserved claim, made by the appraiser of Damages on the Wabash and Erie Canal, it would appear that notwithstanding the full release contained in the contract of September 1st, the appraisers took into consideration the general damage sustained by said Minor by the location of the canal.

This will more fully appear by reference to the "award," a copy of which is here given, and is as follows:

"Peter Minor claims damage for injury done to his property in Providence, Township, Lucas County, Ohio. The applicant states in his application that he had erected and constructed at a great expense, a valuable saw mill, mill dam and mill-race, previous to the construction of the Wabash and Erie Canal, and that by the construction and location of said Wabash and Erie

Canal, his mill dam, mill and race were all destroyed. Upon the examination of the above described premises, and from facts elicited of the Resident Engineer, we find that the canal is located and constructed directly upon the site that the saw mill of the applicant stood on, and that the mill was torn down and destroyed by order of the Resident Engineer, then in charge of that division of the Wabash and Erie Canal. And the applicant further claims for some 150 saw logs that he had on hand at the time of the destruction of his property, above stated; also for timber used and destroyed; also for stone taken from his premises to build and construct culverts on said Wabash and [fol. 130] Erie Canal; also, for the mill irons either lost or become valueless by the destruction of his, the applicant's mill; for a bridge built across his mill race, and for the land occupied by said Wabash and Erie Canal.

Upon mature deliberation and considering that the applicant has laid out of the use of his mill since the year 1839, without receiving from the State any compensation whatever, after comparing the damage incurred with the benefits received, we assess the damages that the said Peter Minor has sustained, or may sustain, as aforesaid, at Two Thousand Five Hundred Dollars, as full compensation and payment of all right, interest, and claim thereto.

"Joseph McCutcheon." "T. J. Price."

$2,500.

February 23rd, 1846.

Peter Minor's Claim

This allowance of $2,500 Dollars is erroneously made, as we conceive, through ignorance on the part of the appraisers, of the existence of the full release contained in the contract of September 1st, of all damage beyond the value of his saw mill, by the said Minor, or from some other cause, not understood. It is clearly a large allowance beyond the value of his mill, which except therefor, we feel warranted in taking into consideration in estimating the damage sustained by the said Minor by the failure of the State to furnish the power for the six mill stones "at and immediately above the Guard Lock near the town of Providence" mentioned in said contract of Sept. 1, 1842.

With the facts in this case fully before them, drawn from the documents and papers here exhibited, the Board adjudge and determine as follows:

First. That the power created by the water discharged around the Guard Lock near the town of Providence, estimated at one and a half mill stone power, be the same more or less, shall be possessed and enjoyed by the said Peter Minor, for his own proper use, and under the limitations and restrictions imposed for the use of the water for the six millstone power by the contract of the 1st of September, 1842.

[fol. 131] Second. That in addition to the large excess awarded by the appraisers for his saw mill, the said Minor shall be allowed the further sum of Two Thousand Eight Hundred Dollars, which with the water for the two pairs of mill stones, stipulated to be taken from the south side of the canal in the contract of the 1st of Sept. 1842, (to be taken from the canal under all the limitations and restrictions imposed by said contract) shall be in full liquidation of all claims for damage, of all and every kind, sustained by said Minor in the location and construction of the Wabash and Erie Canal, and its appurtenances, either reserved in said contract of the 1st of Sept. 1842, or growing out of any failure on the part of the State to fulfill the conditions and stipulations in said contract contained, or for the appropriation of the water of the Maumee River, claimed by said Minor, for canal navigation or hydraulic purposes. And this allowance shall also be taken in satisfaction of a piece of land, not exceeding one acre, situated on the north side of the canal, claimed by the Acting Commissioner as necessary for the erection of a lock-house, for which piece of land, the said Minor has agreed to execute a conveyance to the State in fee simple.

The following report was made by the Board to the Commissioners of the Canal Fund:

Office of the Board of Public Works, Columbus

Feb. 23, 1846.

To E. N. Sill, Esq., Acting Fund Commissioner:

Sir: In the matter of Peter Minor, referred to the Board of Public Works, under a resolution of the General Assembly of the 10th inst., the Board have this day determined that there is due the said Minor, on an adjustment of his rights under his contract, with the State, the sum of twenty eight hundred dollars, independent of certain water power to be secured to said Minor.

By order of the Board.

A. B. Newburgh, Sec'y.

[fol. 132] Columbus, Ohio, Aug. 14th, 1912.

I, Chas. W. Diehl, Secretary of the Board of Public Works of the State of Ohio, hereby certify the foregoing to be a true copy of the Records of said Board as recorded in Vol. 4, A, Pages 73, 74, 78, 79, 80 and 81, so far as the same related to the matter of the grant to Peter Minor on the Wabash and Erie Canal.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Public Works, the day and date above written.

Charles W. Diehl, Sec'y Board of Public Works.

[fol. 133] Stip. Ex. 10

This agreement, Made this 30th day of December, 1912, between the State of Ohio, party of the first part, by the Board of Public Works thereto duly authorized by law, and The Toledo Grain & Milling Company, party of the second part, witnesseth: That said party of the first part, in consideration of the rents reserved, and the covenants of the party of the second part hereinafter contained, and upon the express condition that the party of the second part shall continue during the whole of its term to comply with all

and singular the limitations and conditions hereinafter contained, and shall in every respect perform all the stipulations of this agreement by said party to be performed, agrees to sell and lease to said party of the second part for the term of thirty (30) years, from and after the 31st day of December, 1912, subject to the restrictions limitations and conditions herein contained, the use and occupation of all the surplus water passing Locks Numbers Forty-six (46) and Forty seven (47) of the Miami & Erie Canal in the City of Toledo, Ohio, not necessary for the purposes of navigation and not heretofore leased, the same being not less than a continuous flow of four thousand eight hundred (4,800) cubic feet per minute; it being the intention to regrant and re-lease all of the water, land, water rights and privileges heretofore granted by the State of Ohio to said The Toledo Grain and Milling Company under the terms of a certain lease of water power duly executed on behalf of the State of Ohio by C. A. Flickinger, Acting Commissioner, M. & E. Canal, and on behalf of The Toledo Grain and Milling Company by F. N. Quale, President, W. J. Woods, Secretary, the 13th day of August, 1889, and recorded November 4, 1889, in Volume G of Leases, page 21, Lucas County Records, the water hereby leased to be taken out of the level of the Miami & Erie Canal next above Lock No. Forty-eight in the City of Toledo, and to be conveyed to the mills or other hydraulic works from between two regulating weirs, to be constructed by, and at the expense of the party of the second part as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, agrees to pay to said State the yearly rent or sum of [fol. 134] Fifteen Hundred ($1500.00) Dollars, the rent to be paid semi-annually in advance on the first day of May and November in each and every year, during the continuance of this lease, to the Canal Collector at Columbus, Ohio, or other Agent of the State authorized to receive the same.

And the said party of the second part further agrees to erect, at his own expense, in good, secure, substantial and workmanlike manner, the regulating weirs above mentioned, to be constructed of stone walls and plates of wood, with

a substantial iron bar securely bolted on the top thereof, agreeably to a plan to be furnished by the Superintendent of Public Works or Engineer employed on any adjoining part of the Canal, and under the direction and subject to the inspection of such acting superintendent of Public Works or Engineer, the weir over which the water is drawn over the Canal to be so placed and formed that the top of the weir shall not be more than six inches below the level at which it shall be designed to sustain the surface of the water in that part of the Canal from whence the water is to drawn; and the other, or second weir is to be so placed and formed that the top thereof will be at least one inch lower than the top of the weir over which the water is drawn from the Canal, and of such length and otherwise so constructed that a uniform quantity of water will flow from the upper to the lower levels of the Canal, whether the hydraulic works are in operation or not.

And it is further expressly agreed that the party of the second part shall not for any purpose or in any manner whatever obstruct the equal and regular flow of water from one level of the Canal to another, nor increase the flow, nor cause the water, or any part thereof to flow out of the Canal; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in or about the mills or hydraulic works propelled by water hereby leased. And said party of the second part shall be considered and held responsible for keeping the regulating weirs above described constantly in good repair and free from all obstructions; and a failure to do so, or an interference with the flow of water on their part, [fol. 135] or on the part of any person employed in or about said mills or hydraulic works aforesaid, shall be adjudged a forfeiture of this lease, and of all the rights and privileges of the said party growing out of this agreement.

And said party of the second part further agrees to so construct the head race, tail race, and other works and devices connected with the use of the water hereby leased, that said water will at all times return into the Canal, after being used for hydraulic purposes at some convenient and proper place to be designated therefor by the Superintendent of Public Works, or other authorized agent of the State, on the level next above Lock No. 51, in such manner

as not to carry deposit into the Canal, nor obstruct the navigation thereof; and also that a regular and uniform quantity of water may at all times flow from the upper to the lower levels of the Canal.

And the said party of the second part further agrees, during the continuance of this lease, to keep constantly in good order and repair the weirs, head and tail race, and all other works and devices connected with the use of the water hereby leased, so far as the same shall be necessary to secure the regular and uniform flow of water from the upper to the lower levels, and also to prevent any breach in the bank, the formation of a bar or other injury to the Canal, or impediment to the navigation thereof, and if, nevertheless, any such breach, bar or other injury or impediment should occur in consequence of any of said works not being faithfully and substantially constructed, or being suffered to be out of repair, then said party of the second part shall, on being notified thereof by the Superintendent of Public Works, or other proper agent of the State, immediately repair said breach or other injury; or if such agent of the State shall cause the same to be done, (which he is hereby authoriezd at his option to do,) then said party of the second part shall pay to said agent all necessary expenses incurred in repairing such breach or other injury, on demand.

It is expressly understood and agreed, by and between the parties, that for the purpose of preventing or repairing [fol. 136] breaches, removing bars or other obstructions to the navigation of the Canal, or for the purpose of making any improvements in the Canal, or the works or devices connected therewith, any authorized agent of the party of the first part, may cause the water to be drawn, either partially or wholly out of the Canal, and to remain so drawn out so long as may be necessary for any of the aforesaid purposes; and the said party of the second part shall not be entitled to any deduction from the rent hereby made payable, unless said party shall thereby be deprived of the use of the water for more than one month in any one year; and the party of the first part reserves the right to resume at any time the use of the water hereby leased, whenever the same shall become necessary for the purposes of navigation, and to continue the use thereof so long as the same

shall be necessary for the purpose aforesaid; and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the whole thereof for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privilege; then the party of the second part shall be from such time absolved from all further liabilities growing out of this agreement.

And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such annual rent as may be agreed upon between the parties hereto. And in case of disagreement between the aforesaid parties, the value of such rental shall be determined by three judicious disinterested freeholders, one to be chosen by the Superintendent of Public Works, or authorized agent of the State, one by the party of the second part and the third by the two thus chosen.

And it is further understood and agreed, that the water power hereby leased, shall not be used to drive or propel any saw mill, or other machinery or other works, from which saw dust, chips or other rubbish will be likely to be carried, thrown or floated into the Canal, so as to form bars or other obstructions to the navigation in the Canal, or to clog the gates, waste weirs or regulating weirs, or otherwise injure or obstruct the same. And the party of the second part shall at all times be bound to keep the Canal clear of [fol. 137] all rubbish, or other obstructions consequent, in any manner, on the use of the water hereby leased, or of the works or machinery erected therefor.

And said party of the first part, in consideration of rents and agreements hereinbefore specified, further agrees to lease to the party of the second part, upon the same conditions, and subject to the same limitations and restrictions herein contained, all that certain piece or parcel of land, situate in the City of Toledo, Ohio, butted, bounded and described as follows:

Being part of River Tracts Numbers Three (3) and Four (4) of the Reservation of Twelve Miles, beginning at a point forty-seven (47) feet at right angles from the south-east face of the lock wall of Lock Number Five (5) on the

Wabash and Erie Canal and one (1) chain above the head of said Lock, and running thence north forty-two (42) degrees and thirty (30) minutes east parallel with said face of said lock wall to the Toledo Side Cut below Lock Number Three (3) ten (10) chains and eighty-six (86) links, thence south eighty-nine (89) degrees east on said Canal bank two (2) chains and seventy (70) links, thence south forty-two (42) degrees and thirty (30) minutes west twelve (12) chains and sixty-seven (67) links, thence north forty-seven (47) degrees and ten (10) minutes west two (2) chains to the place of beginning, containing two (2) acres and thirty-five hundredths (.35) of an acre, to enable the party of the second part to use and enjoy the use of the water power hereby leased; for the like term of Thirty (30) years from the 31st day of December, 1912.

It is further understood and agreed, that said party of the second part shall not sell, assign or transfer his right or interest derived from this agreement, or any part thereof, to any person or persons, unless the assent of some authorized agent of the State shall first be obtained therefor in writing.

And if at any time, any installment which shall become due for rent as hereinbefore expressed, and without demand made therefor, shall remain unpaid for one month from the time the same shall fall due, or if the party of the second part shall in any respect fail to fulfill and perform all the en-[fol. 138] gagements of said party hereinbefore expressed, or shall do, or permit to be done, any act or thing hereby prohibited, or shall in any respect violate this agreement, then, and in either case, all the rights and privileges derivable to said party from this agreement shall from the time of such failure or violation cease and determine, and any authorized agent of the State or lessee under said State shall have full right and power to enter upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part; and said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

And the party of the second part hereby waives all right of demand by the party of the first part.

In testimony whereof, the parties executed this agreement the day and year first above written.

(Signed) W. Kirtley, Jr., Member Bd. of Public Works. (Signed) B. W. Baldwin, Member Bd. of Public Works. (Signed) J. A States, Member Bd. of Public Works. The Toledo Grain & Milling Co. (Signed) D. W. Camp, Pres.

Signed, sealed, and delivered in presence of: Witnesses: (Signed) J. D. Hurlbert. (Signed) Arthur E. Frost.

[fol. 139] STIP. EX. 11

A Resolution Accepting Appraisement and Declaring Intention of the City of Toledo to Purchase All That Portion of the Abandoned Bed of the Miami and Erie Canal Included in the Provisions of House Bill No. 560 of the General Assembly of Ohio, as Published in Volume 108, Page 1138, Part 2, of the Laws of Ohio, 1919

Whereas, That portion of the Miami and Erie Canal of Lucas County, Ohio, described in House Bill No. 560 of the General Assembly of Ohio, as published in Volume 108, page 1138, Part 2, Laws of Ohio, 1919, and set forth in the following resolution, has been abandoned and has been duly appraised in accordance with the provisions of said act, to be of the value of $300,000.00 and,

Whereas, By said act provision was made for the purchase by the City of Toledo of said abandoned portion of said Miami and Erie Canal at and for the appraised value thereof: Now, therefore,

Be it resolved by the Council of the City of Toledo (two-thirds of all members elected thereto concurring therein):

Section 1. That the appraisement of the abandoned portion of the Miami and Erie Canal, as provided for in said House Bill No. 560, and as herein before set forth, for the sum of $300,000.00 be and the same is hereby approved and accepted by the City of Toledo.

Section 2. That the City of Toledo, Ohio, hereby declares its intention to purchase and acquire by proper deed from

the State of Ohio, in accordance with the terms of said act, all the abandoned portion of the Miami and Erie Canal lying within Lucas County, Ohio, as set forth in said House Bill No. 560, and more particularly described as follows:

Commencing at the foot of the outlet lock of the Miami and Erie Canal in the City of Toledo, Lucas County, Ohio, being Lock No. 52, of said canal numbering north from Loramie Summit, and extending thence westerly 1,200 feet including the full width of the bed and banks thereof as defined by S. A. Buchanan's survey of said canal made under the direction of the state board of public works in the summer of 1909; also that portion of said Miami and Erie Canal commencing at the inner face of the southerly abutment of the old aqueduct over Swan Creek on the Manhattan branch of said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, for a distance of 45,683 feet to a point just below the head of the Maumee side-cut, near Maumee, Ohio, excepting therefrom any portion of any state lot now under an existing lease, and likewise excepting therefrom any portion of the same that may possibly be required in the construction of any ship or barge canal, under authority of legislation passed or to be passed by the Congress of the United States, or by the State of Ohio.

Section 3. That the City Clerk is hereby directed to file with the Governor of Ohio, a certified copy of this resolution as notice of acceptance of said appraisement, and of intention of the City of Toledo, to purchase said abandoned portion of said canal in accordance with the provisions of said House Bill No. 560.

Section 4. That this resolution shall take effect and be in force from and after the earliest period allowed by law.

[fol. 140] Adopted September 11, 1922.

C. D. Hoover, President pro Tem, of Council.

Attest: A. W. Payne, Clerk of Council.

I, A. W. Payne, Clerk of Council of the City of Toledo, State of Ohio, do hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Council September 11, 1922; approved by the Mayor Sepfember

16, 1922; published in the Toledo City Journal September 16, 1922, and as found recorded in Volume "V" of Resolutions, on Page 9, on file in this office.

Attest:

(Sgd.) A. W. Payne, Clerk of Council. (Seal City of Toledo, Clerk of Council, State of Ohio.)

Toledo, Ohio, May 16, 1925.

[fol. 141] STIP. EX. 12

An Ordinance No. 3043, Authorizing the Director of Public Service to Take the Necessary Steps for Eliminating the Water in the Miami and Erie Canal and to Make Contracts of Settlement with the Defiance Gas and Power Company and the Toledo Grain and Milling Company

Whereas, the elimination of water in the Miami and Erie Canal is necessary to the immediate preservation of public property and safety and the same constitutes an emergency, therefore,

Be it ordained by the Council of the City of Toledo:

Section 1. That the Director of Public Service be and he is hereby authorized and directed to take all proper and necessary steps for the elimination of water in the Miami and Erie Canal from Lock 52 in the City of Toledo and from the southerly aqueduct at Swan Creek to the cut-off in the Village of Maumee, Ohio, near the plant of the Defiance Gas and Power Company, and to cause all of said water in said canal to be eliminated.

Section 2. That the Director of Public Service is further authorized to enter into contract, subject to the approval of the Council of the City of Toledo, with the Defiance Gas and Power Company and The Toledo Grain and Milling Company for the purpose of settling all claims of every kind and description that said companies may have against the City of Toledo or State of Ohio, on account of the abandonment by said State of Ohio of the bed of the Miami and Erie Canal and of the elimination of water in said canal and all other things incident thereto.

Section 3. That this ordinance, being an emergency measure, shall take effect and be in force from and after its passage.

Passed Sept. 10, 1923.

(Sgd.) E. D. Cullen, President of Council.

Attest: (Sgd.) A. W. Payne, Clerk of Council.

I, A. W. Payne, Clerk of the Council of the City of Toledo, State of Ohio, do hereby certify that the foregoing is a true and correct copy of an ordinance passed by the Council September 10, 1923; approved by the Mayor September 14, 1923, and published in The Toledo City Journal September 15, 1923, and as found recorded in Volume 20 of General Ordinances, on Page 27, on file in this office.

Attest:

(Sgd.) A. W. Payne, Clerk of Council. (Seal Clerk of Council, City of Toledo, State of Ohio.)

Toledo, Ohio, May 16, 1925.

[fol. 142] STIP. EX. 13

Resolution

Whereas, the City of Toledo in December, 1922, acquired from the State of Ohio by deed that part of the Miami and Erie Canal lying within the corporate limits of the city and extending southwesterly through the Village of Maumee to and near the Maumee side-cut, under the provisions of H. B. 560, duly enacted by the general assembly of the State of Ohio; and,

Whereas, the city in acquiring said portion of the Miami and Erie Canal intended and does intend to improve it as a boulevard over the entire length thereof; and,

Whereas, by the terms of said act the city is to construct all bulkheads and embankments necessary to cut off the flow of water at or near the southerly end of the canal abandoned by the state and acquired by the City of Toledo, as herein stated, and construct all overflow waste-weirs and necessary channels required to care for the surplus water

that must be wasted at some point near the Maumee side-cut; and,

Whereas, the City of Toledo is now ready to proceed with the construction of the necessary bulkheads, embankments, waste-weirs and channels to cut off the flow of water at the southerly end of the portion of the canal it has acquired and through the Maumee side-cut into the Maumee River; and,

Whereas, an emergency exists, now, therefore,

Be it resolved by the Council of the City of Toledo:

Sec. 1. That it is necessary to cut off the flow of the water of the Miami & Erie Canal at the southerly end of the portion of the canal acquired by the City of Toledo, and through the Maumee side-cut, and to construct the necessary bulkheads, embankments, waste-weirs and channels necessary to cut off and divert the flow of water into the Maumee River through said Maumee side-cut, and to do the work necessary in connection therewith.

Sec. 2. That the director of Public Service be and is hereby authorized and directed to notify the Superintendent of Public Works at once of the intention of the City of Toledo to proceed with said work, and prepare and file with the Superintendent of Public Works plans therefor, and that he effect all necessary arrangements with the Superin- [fol. 143] tendent of Public Works for the construction thereof under the supervision and direction and with the approval of the Superintendent of Public Works.

Sec. 3. That this resolution, being an emergency measure, shall take effect and be in force from and after its passage.

Adopted March 9, 1925.

(Signed) F. J. Mery, President of Council.

Attest: (Sgd.) A. W. Payne, Clerk of Council.

[fol. 144] STIP. EX. 14

K. W. H. Generated at the Maumee Hydro Plant, by Months, for the Years 1914 to 1924, Inc.

1914

Jan.	658,400	
Feb.	466,200	
March	448,200	
Apr.	557,300	Ice in Feed Gates 13000 Volt Line out.
May	447,350	Search for Body
June	653,800	Volt Line out.
July	541,850	
Aug.	333,250	Sewer Drained Canal
Sept.	507,250	
Oct.	376,600	Building Bridge
Nov.	426,300	
Dec.	390,900	
	5,807,400	

1915

Jan.	448,850	
Feb.	443,900	
March	689,300	
Apr.	644,550	
May	690,700	
June	698,200	
July	796,600	
Aug.	889,900	
Sept.	856,550	
Oct.	873,000	
Nov.	860,300	
Dec.	775,000	
	8,666,850	

	1916	
Jan.	398,250	Water out of Canal.
Feb.	549,100	
March	645,450	
Apr.	677,800	
May	740,150	
June	735,250	
July	697,500	
Aug.	538,400	
Sept.	158,850	Low Water
Oct.	170,200	" "
Nov.	170,550	" "
Dec.	351,650	" "
	5,833,150	

[fol. 145]

	1917	
Jan.	432,400	
Feb.	553,950	
March	746,900	
Apr.	698,350	
May	798,000	
June	837,400	
July	662,750	
Aug.	593,400	
Sept.	288,350	
Oct.	435,500	
Nov.	831,400	
Dec.	700,500	
	7,578,900	

	1918	
Jan.	650,700	
Feb.	522,250	
March	884,600	
Apr.	907,600	
May	816,400	
June	722,400	
July	355,900	

Aug.	138,700	No Water.
Sept.	624,600	
Oct.	268,800	No Water
Nov.	746,000	
Dec.	726,500	
	7,364,450	

1919

Jan.	625,500	
Feb.	686,350	
March	761,950	
Apr.	725,350	
May	797,900	
June	616,750	
July	370,200	Water Low
Aug.	499,650	
Sept.	248,150	Water Low.
Oct.	735,500	
Nov.	704,950	
Dec.	604,250	
	7,376,500	

[fol. 146]

1920

Jan.	480,850	
Feb.	546,100	
March	722,600	
Apr.	692,500	
May	833,000	
June	837,600	
July	871,500	
Aug.	579,900	
Sept.	795,800	
Oct.	423,900	
Nov.	746,500	
Dec	587,300	
	8,117,550	

	1921	
Jan.	576,000	
Feb.	597,100	
March	620,400	
Apr.	575,700	
May	596,000	
June	129,000	Break in Canal.
July	576,500	
Aug.	529,600	
Sept.	471,600	
Oct.	602,100	
Nov.	739,900	
Dec.	728,200	
	6,742,100	
	1922	
Jan.	541,100	
Feb.	532,700	
March	656,900	
Apr.	393,900	
May	628,700	
June	647,800	
July	795,300	
Aug.	552,600	
Sept.	750,300	
Oct.	564,600	
Nov.	509,600	
Dec.	572,700	
	7,146,200	
[fol. 147]	1923	
Jan.	570,300	
Feb.	485,600	
March	466,400	Break in Canal.
Apr.	697,800	
May	682,900	
June	625,000	
July	692,100	

Aug.	769,000	
Sept.	734,200	
Oct. .	750,800	
Nov. .	778,300	
Dec. .	781,900	
	8,034,300	

1924

Jan.	94,100	Break in Canal.
Feb.	291,000	
March	62,400	Break in Canal.
Apr.	346,200	
May	552,300	
June	564,300	
July	658,400	
Aug.	613,100	
Sept.	623,100	
Oct. .	484,900	
Nov.	339,800	
Dec. .	437,500	
	5,067,100	

Recapitulation

1914	5,807,400
1915	8,666,850
1916 .	5,833,150
1917	7,578,900
1918	7,364,450
1919	7,376,500
1920	8,117,550
1921	6,742,100
1922	7,146,200
1923	8,034,300
1924	5,067,100
	77,734,500

[fol. 148] KWH Electric Generation of the Maumee Hydro Plant from Jan., 1925, to Mar., 1928

1925	
Jan.	580,400
Feb.	524,700
March	833,100
Apr.	60,300
May	762,200
June	585,900
July	709,100
Aug.	615,700
Sept.	397,200
Oct.	529,800
Nov.	744,100
Dec.	662,400
	7,004,900
1926	
Jan.	583,600
Feb.	513,900
March	455,800
Apr.	703,800
May	849,700
June	842,300
July	739,900
Aug.	834,800
Sept.	866,000
Oct.	934,500
Nov.	911,500
Dec.	611,700
	8,847,700
1927	
Jan.	655,800
Feb.	758,500
March	972,700
Apr.	915,600
May	982,900
June	917,200

July	894,000
Aug.	717,900
Sept.	624,000
Oct.	811,600
Nov.	585,100
Dec.	620,419
	9,455,819

1928

Jan.	481,144
Feb.	571,158
Mar.	885,935
	1,938,237

[fol. 149] STIP. EX. 15

Certified Copy

No. 264,792

Deed

Whereas, on the 22nd day of January, 1920, the General Assembly of Ohio, passed an Act abandoning a portion of the Miami and Erie Canal in Lucas County, Ohio, and providing for the sale or lease of the same to the City of Toledo, Ohio, upon the terms in said Act, and hereinafter set forth, which said Act appears in 108 Ohio Laws (part 2) at page 1138, et seq.; and

Whereas, the Special Board of United States Army Engineers which at the time of the passage of said Act was, under Congressional authority approved March 2, 1919, making surveys of the enlarged canal mentioned in said Act, set forth in their report dated May 7, 1921, that the route considered by them as to said enlarged canal mentioned in said Act did not embrace the section of the Miami and Erie Canal abandoned by said Act and hereinafter described, but followed the Maumee River from near Defiance, Ohio, to Lake Erie, at Toledo, Ohio, as does likewise the route considered by them for a branch canal to

connect Lake Erie and Lake Michigan, and further set forth in their said report the conclusion that the construction of the proposed enlarged canal mentioned in said Act of the General Assembly of Ohio is not economically warranted, and did not in their said report show any part of the tract abandoned by said Act and hereinafter described as being required for an enlarged canal; and

Whereas, subsequent to the making of said engineer's report two appraisers were appointed by the Governor of Ohio, as directed by said Act and proceeded in conjunction with the Superintendent of Public Works of the State of Ohio to make an appraisement of the canal property abandoned by said Act and hereinafter described, which appraisement was in the sum of Three Hundred Thousand Dollars ($300,000); and

Whereas, said appraisers on or about the 14th day of January, 1922, filed in writing with the Governor of the State of Ohio, and with the Mayor of the City of Toledo, certified copies of their said appraisement; and

[fol. 150] Whereas, the City of Toledo, by resolution of its City Council adopted September 21, 1922, approved the appraisement of said canal property and elected to purchase said property; and

Whereas, by Ordinance No. 2546 adopted by its City Council on July 24, 1922, said City of Toledo, provided an issue of bonds in the sum of three hundred fifteen thousand dollars for the purchase of said canal property for park and boulevard purposes; and

Whereas, by Ordinance No. 2659 adopted by its City Council on the 23rd day of October, 1922, said City of Toledo, appropriated the necessary funds for the purchase of said canal property and is now ready to make payment fro said property upon the execution and delivery to it by the State of Ohio, of a proper deed for said property; and

Whereas, on the 16th day of November, 1922, the State of Ohio, acting by Harry L. Davis, Governor, and John G. Price, Attorney General, and the City of Toledo, acting by Bernard Brough, its Mayor and William T. Jackson, its Director of Public Service, thereunto duly authorized by Ordinance 2669 adopted by the Council of said City of Toledo on the 30th day of October, 1922, entered into the

contract described in Section 8 of said Act, which contract is here referred to and made part hereof; and

Whereas, the City of Toledo has paid into the State Treasury of Ohio the sum of Three Hundred Thousand Dollars ($300,000.00) in payment of the purchase price of said canal property; and

Whereas, each and all of the conditions precedent to the making and delivery of a deed to said City of Toledo, by the State of Ohio, for said canal property, have been complied with and performed.

Now, therefore, The State of Ohio does hereby grant, bargain, sell and convey unto the City of Toledo, a municipal corporation of the State of Ohio, its successors and assigns, forever, for park and boulevard purposes as aforesaid, the following described real estate, to-wit:

Commencing at the foot of the outlet lock of the Miami and Erie Canal in the city of Toledo, Lucas County, Ohio, being lock No. 52, of said canal numbering north from Loramie Summit, and extending thence westerly 1,200 feet, [fol. 151] including the full width of the bed and banks thereof as defined by S. A. Buchanan's survey of said canal made under the direction of the state board of public works in the summer of 1909; also that portion of said Miami and Erie Canal commencing at the inner face of the southerly abutment of the old aqueduct over Swan Creek on the Manhattan branch of said Miami and Erie Canal, and extending thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, for a distance of 45,683 feet to a point just below the head of the Maumee side-cut, near Maumee, Ohio, excepting therefrom any portion of any state lot now under an existing lease, and likewise excepting therefrom any portion of the same that may possibly be required in the construction of any ship or barge canal, under authority of legislation passed or to be passed by the Congress of the United States, or by the State of Ohio.

Excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and excepting therefrom and subject to the rights of said owners to a renewal of said existing leases.

To have and to hold said premises as fully and completely and subject to all such conditions and restrictions as the State of Ohio might or should convey the said premises by virtue of the provisions of the aforesaid Act of the General Assembly of Ohio.

In witness whereof, the State of Ohio has hereunto set its name by Harry L. Dapis, its Governor, who has hereunto subscribed his name and caused the great seal of the State of Ohio to be affixed hereto, in triplicate, this 29th day of December, A. D. 1922.

The State of Ohio, by Harry L. Davis, Governor.

By the Governor: Tarry C. Smith, Secretary of State. (The Great Seal of the State of Ohio.)

Approved December 28, 1922. John G. Price, Attorney Gen.

[fol. 152] United States of America,
State of Ohio,
Lucas County, ss:

I, Harry M. Curtis, Recorder of Lucas County, and State of Ohio, aforesaid, in whose custody the County Records are required by the laws of the State of Ohio to be kept, do hereby certify the above and foregoing to be a true, perfect and complete copy of the Record of a certain deed recorded in Volume 589 of Deeds of said County, at page 603, and that the said foregoing copy has been compared by me with the original Record, and the same is a full and complete transcript thereof.

In Witness Whereof, I have hereunto subscribed my name officially and affixed the seal of said County and State, at the Court House in Toledo, this 15th day of May, A. D. 1925.

(Sgd.) Harry M. Curtis, Recorder Lucas County, Ohio, by (Sgd.) Anton Weil, Deputy. (Seal.)

[fol. 153] Stip. Ex. 16

In the District Court of the United States for the Northern District of Ohio, Western Division

No. 515. In Equity

The Maumee Valley Electric Company, Plaintiff,

vs.

The City of Toledo, Ohio; Bernard F. Brough, Mayor of said City, and William T. Jackson, Director of Public Service of said City, Defendants

Journal Entry (Filed July 7, 1925)

This cause came on to be heard upon the merits at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the equities of the case are with the defendants and against the plaintiff, that the plaintiff is not entitled to the relief prayed for in its petition, that the temporary restraining order heretofore granted be and the same is hereby discontinued, and that the petition of the plaintiff be and the same is dismissed at its cost; to each and all of which findings the plaintiff by its counsel in open Court then and there excepted.

Plaintiff gives notice of appeal, and appeal bond is fixed at Five Thousand Dollars ($5,000.00), but not to operate as a supersedeas.

John M. Killits, Judge.

[fol. 154] STIP. EX. 17

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 4483

THE MAUMEE VALLEY ELECTRIC COMPANY, Appellant,

vs.

THE CITY OF TOLEDO et al., Appellees

Appeal from the District Court of the United States for the Northern District of Ohio

Decree (Filed May 14, 1926)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed with costs and the record remanded with directions to enter a new decree not inconsistent with the opinion of this Court, including injunction against doing any act to obstruct or prevent the flow of water in the canal to plaintiff's hydro-electric plant at Maumee, except upon compliance with its obligation to make payment to plaintiff as construed in the opinion of this court.

[fol. 155] STIP. EX. 18

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 515. In Equity

THE MAUMEE VALLEY ELECTRIC COMPANY, Plaintiff,

vs.

THE CITY OF TOLEDO, OHIO; BERNARD F. BROUGH, as Mayor of said City of Toledo, and William T. Jackson as Director of Service of said City, Defendants

Decree on Mandate

This cause having been removed from this Court to the United States Circuit Court of Appeals for the Sixth Cir-

cuit by appeal from the decree entered in this cause in this Court on the seventh day of July, 1925, in favor of said defendants and against said plaintiff; and said Circuit Court of Appeals having ordered, adjudged and decreed on May 14, 1926, that said decree of this Court in this cause be reversed and that the same was thereby reversed with costs, and that the record be remanded to this Court with directions to enter a new decree not inconsistent with the opinion of that Court filed May 14, 1926, including injunction against said defendants from doing any act to obstruct or prevent the flow of water in the Miami and Erie Canal to plaintiff's hydro-electric plant at Maumee, Ohio, except upon compliance with the obligation of defendant, the City of Toledo, to make payment to plaintiff as construed and determined in said opinion of that Court, and said United States Circuit Court of Appeals having remanded said cause to this Court as appears by mandate of said Circuit Court of Appeals, now here; and

Whereas the Clerk of this Court on August 4, 1926, entered on said mandate a decree which the Court now finds should be amended so as to comply with said decree of said United States Circuit Court of Appeals of May 14, 1926, and said mandate:

Now, therefore, amending said decree of this court of August 4, 1926, entered on said mandate as aforesaid, and on motion of counsel and solicitors for the plaintiff, it is [fol. 156] ordered, adjudged and decreed that said final decree of this court entered as aforesaid on the 7th day of July, 1925 be and the same hereby is reversed, vacated, set aside and held for naught; that the equities of and findings in this cause on the issues joined herein are with the plaintiff and against the defendants; that on the issues joined in this cause the court finds for the plaintiff and against the defendants; and that said defendants and each of them and their officers, agents, appointees and employees and their respective successors be and they and each of them hereby are enjoined from doing any act or thing to prevent, obstruct or in any way interfere with and from in any way preventing, obstructing or interfering with the flow of water to, in, or through the Miami and Erie Canal to and through plaintiff's hydro-electric plant at Maumee, Ohio, except upon and until full compliance by defendant, The City of

Toledo, Ohio, with its obligation to make payment and compensation to plaintiff as construed, determined and required in and by said opinion of said United States Circuit Court of Appeals and the findings of this decree; and it is further ordered, adjudged and decreed that said plaintiff have and recover from said defendant, The City of Toledo, Ohio, its costs herein expended, taxed at $—, and have execution therefor.

[fol. 157] STIP. EX. 19

Application to Lease

Division of Public Works

August 7, 1924.

Director of Highways and Public Works and Superintendent of Public Works, Columbus, Ohio.

SIR: Application is hereby made to lease from the State of Ohio, for hydraulic purposes, the following described state property, to-wit:

Description:

The use and occupation of all the water and lands in and along the Miami and Erie Canal between the intake of said canal at Providence, Ohio, and the power plant of the undersigned, the applicant herein, at Maumee, Ohio, covered and called for by leases heretofore granted by the State of Ohio for and of waters and lands in and along said canal between said points, which leases are as follows:

1. Lease to Robert J. Law, trustee, dated March 12, 1895.

2. Supplemental lease and agreement to the Maumee Valley Electric Company, dated December 14, 1910, which is supplementary to the said Robert J. Law lease.

3. Lease to George K. Detwiler, dated February 20, 1901.

4. Lease to A. C. Tryon, dated April 8, 1903.

5. Lease to The Maumee Paper Company, dated April 8, 1903.

6. Lease to Thomas W. Studer, dated November 13, 1906.

Each of the above leases is now owned by the undersigned, applicant herein, The Maumee Valley Electric Company, and the lands covered thereby are now occupied by this applicant, and the waters called for therein are now carried through the eighteen mile level of said canal and taken from said level by the undersigned and used by it for hydraulic purposes at its hydro-electric power plant situated on the northerly bank of the Maumee River at Maumee, Ohio.

The undersigned respectfully now asks a renewal of each of said leases under the terms thereof.

Very respectfully, The Maumee Valley Electric Company, by U. G. Denman, Its Attorney.

[fol. 158] STIP. EX. 20

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 101,344

THE MAUMEE VALLEY ELECTRIC COMPANY, a Corporation, Plaintiff,

vs.

LOUIS A. BOULAY, Individually and as Superintendent of Public Works of the State of Ohio and as Director of the Department of Highways and Public Works of the State of Ohio, Defendant

Petition—Filed March 14, 1925

The plaintiff is a corporation, duly organized and incorporated under and by virtue of the laws of the State of Ohio, with its principal office and place of business in the City of Toledo in said State. It owns and operates a hydro-electric plant and property situated near the northerly corporate limits of the municipality of Maumee in said State upon a strip of land lying between the Maumee River and the portion of the Miami and Erie Canal hereinafter described; and said plant and property are and for several

years last past have been used and operated, by means of the canal waters hereinafter referred to, for the generating and furnishing of electricity to a large number of customers for light, heat and power purposes in said County and its vicinity.

The defendant is the duly appointed, qualified and acting Superintendent of Public Works of the State of Ohio and Director of the Department of Highways and Public Works of the State of Ohio, and, as such, has jurisdiction and authority over the canals, the canal lands and waters of the State of Ohio, including the portion of the Miami and Erie Canal extending from the municipality of Grand Rapids, Ohio, northeastward to the City of Toledo, Ohio, and paralleling the Maumee River throughout said dis- [fol. 159] tance. The general direction of the flow of said river throughout said distance is northeasterly.

The State of Ohio maintains and for many years last past has maintained a dam in and across the said Maumee River at or about the point where the said municipality of Grand Rapids is located on said river, one of the purposes of which said dam was and is to divert a portion of the water from said river, by means of an intake, into said canal and thence by ways of said canal to the northerly end of the same in the City of Toledo, at which point the waters there remaining in said canal have been and still are discharged into said Maumee River, the level of said river being many feet below the level of said canal both at said point of discharge and throughout the portion thereof extending between the said municipalities of Grand Rapids and Toledo as aforesaid.

By so constructing said dam and diverting said water of said river into said canal and discharging the same back into said river as hereinabove described, valuable water power was and is created, and on or about the dates hereinafter mentioned the State of Ohio, through its duly constituted Board of Public Works, executed to various persons, firms and corporations, the leases of water rights hereinafter specifically mentioned, all of which said leases have, with the consent and approval of the said Board, been duly transferred and assigned to the plaintiff company, which latter is now and for many years last past has been the owner of said leases and of the water rights and privi-

leges therein and thereby demised and granted, said leases being as follows:

(1) Lease between the Stat of Ohio, by its Board of Public Works, party of the first part, and Robert J. Law, Trustee, party of the second part, dated the 12th day of March, 1895, selling and leasing to the said party of the second part the use and occupation of all of the surplus water of the Miami and Erie Canal between the municipalities of Providence and Toledo not needed for navigation or not then under lease, the municipality of Providence being located on the Maumee River opposite the municipality of [fol. 160] Grand Rapids above referred to. Said lease, which was for a primary period of thirty years from and after the 12th day of March, 1895, contains the express agreement that the party of the second part, which is the plaintiff herein, should be entitled to a renewal of said lease, for a like terms of years, for such annual rent as might be offered by the highest responsible bidder therefor, who would also agree to purchase of the said party of the second part all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power thereby leased, at such price as said buildings should be adjudged to be worth by three judicious freeholders, to be chosen as in said lease set forth; and that if no such bid should be made upon the terms aforesaid and at a higher rate than the rental specified in said lease, said party of the second part should be entitled to such renewal on the terms of said lease itself. The plaintiff has requested and demanded the renewal of said lease, and, although under no obligation so to do, has offered a much higher rental therefor than in said lease specified, and no other person, firm or corporation has made any bid for said lease or the renewal thereof, or has offered to pay any rental whatsoever therefor, with the result that except for said increased rental voluntarily to be paid by the plaintiff, the plaintiff is entitled to a renewal of said lease upon the terms therein contained, and by reason of the facts aforesaid the said lease now stands renewed to the plaintiff and is in full force and effect.

(2) Lease between the said State of Ohio, by its Board of Public Works, party of the first part, and Thomas W. Studer, party of the second part, dated the 13th day of

November, 1906, selling and leasing to the said party of the second part the use and occupation of 2100 cubic feet of water per minute, the same to be taken out of the portion of said canal situated between the said municipalities of Grand Rapids and Toledo aforesaid. Said lease was and is for the period of thirty years from and after the said first day of November, 1906, and is in full force and effect.

(3) Lease between the said State of Ohio, by its Board of Public Works, party of the first part, and A. C. Tryon, [fol. 161] party of the second part, dated the 8th day of April, 1903, selling and leasing to the said party of the second part the use and occupation of 2050 cubic feet of water per minute, the same to be taken out of the portion of said canal last aforesaid. Said lease was and is for the period of thirty years from and after the 1st day of May, 1903, and is in full force and effect.

(4) Lease between the said State of Ohio, by its Board of Public Works, party of the first part, and George K. Detwiler, party of the second part, dated the 20th day of February, 1901, selling and leasing to the said party of the second part the use and occupation of 833 cubic feet of water per minute, the same to be taken out of the portion of said canal last aforesaid. Said lease was and is for the period of thirty years from and after the 1st day of May, 1901, and is in full force and effect.

(5) Lease between the said State of Ohio, by its Board of Public Works, party of the first part, and The Maumee Paper Company, party of the second part, dated the 8th day of April, 1903, selling and leasing to the said party of the second part the use and occupation of 2050 cubic feet of water per minute, the same to be taken out of the portion of said canal last aforesaid. Said lease was and is for the period of thirty years from and after the first day of May, 1903, and is in full force and effect. The plaintiff has duly kept and performed each and all of the terms and conditions of each and all of said leases on its part to be kept and performed, and the defendant has at all times accepted and is still accepting from the plaintiff the rents and services required of it by the covenants thereof.

Said leases include all of the water rights existing in and pertaining to the waters of that portion of said canal ex-

tending from the said municipality of Grand Rapids to the said plant and property of the plaintiff.

On the 9th day of April, 1902, the legislature of the State of Ohio passed an act entitled "To provide for the retention, maintenance and supervision of the canals of Ohio, their water supplies, reservoirs, dams, feeders and adjacent lands; to encourage the building of canal boats and the extension of cheap transportation"; 95 Ohio Laws, 118 et seq.; and thereby declared it to be the settled policy of the [fol. 162] State of Ohio that the said Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands, extending from the City of Cincinnati to the City of Toledo, should be retained and maintained as a public canal.

Acting in good faith and in full reliance upon said Act of the General Assembly and upon the rights assured to it under said leases, the plaintiff, on or about the 14th day of December, 1910, duly entered into an agreement and supplementary lease of that date with the State of Ohio, by its said Board of Public Works, wherein and whereby, in consideration of the enlargement of the water rights granted by the State in the leases hereinabove described, the plaintiff agreed to increase the rentals to be paid thereunder and to excavate and remove from said canal a quantity of rock located in the same near the municipality of Waterville; also to remove all other obstructions in said canal throughout the 18 mile level thereof between the said municipality of Grand Rapids and the plaintiff's plant hereinabove referred to, and to raise the banks of said canal throughout the said distance, all at its own expense.

Thereafter the plaintiff duly proceeded with the excavation of said rock, the removal of said obstruction from said canal and the raising of the banks thereof, and expended upon the same a sum in excess of $50,000.00; and the plaintiff has duly performed all of the terms and conditions of said agreement and supplementary lease on its part to be done and performed, including the payment of said additional rental aforesaid.

In derogation of the rights of the plaintiff acquired by it under and by virtue of said leases, agreement and supplementary lease aforesaid, (hereinafter collectively re-

ferred to as "said leases") the General Assembly of the State of Ohio, on the 22nd day of January, 1920, passed an act entitled: "An act to abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to provide for the sale or lease of the same to the City of Toledo, Ohio," as more fully appears in Volume 108, part 2, at pages 1138 et seq. of the Laws of Ohio; and in pursuance of the authority therein attempted to be granted, the State of Ohio attempted to sell and the said City of Toledo attempted to purchase from it all that portion of said canal property lying between the outlet lock thereof in the said City of Toledo and a point immediately below or south of the so-called Maumee Side Cut, which side cut is located south of [fol. 163] the said municipality of Maumee and therefore south of the plant and property of the plaintiff above described.

As against the rights of the plaintiff, existing under and by virtue of the said leases, the act of the General Assembly last aforesaid, in so attempting to abandon said canal, and the said attempted sale to and purchase by the said City of Toledo of said canal property were and are void and of no effect.

It was provided in said act, however, that the deed from the State of Ohio to the said City of Toledo, conveying said canal property, should except therefrom, and said conveyance should be subject to, the rights of the owners of existing leases of either canal lands or water or both, and to the rights of said owners to a renewal of said existing leases; and in the deed for said canal property, executed by the State of Ohio to and accepted by the said City of Toledo, said rights were so excepted and said conveyance was made subject thereto; notwithstanding all of which the said City of Toledo is demanding of the defendant that a sluice gate situated in said canal at the said Maumee Side Cut be so opened as to cause all of the water in said canal to flow through said Side Cut into the said Maumee River, thereby diverting from the plaintiff's plant and property the said canal water to which it is entitled under and by virtue of said leases, and the use of which is necessary and essential to the operation of plaintiff's said hydro-electric plant and property.

The fair value of plaintiff's said plant and property, installed and constructed by it in full reliance upon its rights under said leases, is not less than the sum of $300,000, exclusive of any value of or for said water rights, which rights are of themselves of great and additional value; and the proposed or any diversion of the or any of said canal water from plaintiff's said plant and property, whether by virtue of the opening of said sluice gate or otherwise, would entirely destroy the value of said plant and property except for the purposes of salvage or junk, and would also entirely destroy the value of said water rights and render the plaintiff incapable of furnishing hydro-electric current to its said customers.

[fol. 164] The defendant, in violation of the rights of the plaintiff and in utter disregard of said leases and the covenants of the State of Ohio therein contained, threatens and is about to, and unless immediately restrained and enjoined by this Honorable Court will, forthwith accede to said demand of the said City of Toledo and open said sluice gate or cause or permit the same to be opened, thereby diverting all of said water from said canal and from the plaintiff's said plant and property aforesaid, destroying the value of the plaintiff's said plant and property, ruining its said business, depriving it of its customers and of the revenues derived therefrom, rendering it impossible for the plaintiff to perform the duties enjoined upon it by law as a public utility, confiscating its property and depriving it of the same without just or any compensation and without due process of law, in violation of the Constitution of the State of Ohio and of the United States, respectively, all to the irreparable damage of the plaintiff and for which it has and can have no adequate remedy at law.

Wherefore plaintiff prays that an injunction may issue out of this Honorable Court forthwith, restraining and enjoining the defendant, individually and as Superintendent of Public Works of the State of Ohio and as Director of the Department of Highways and Public Works of the State of Ohio, his agents, employees, servants and any and all persons in any wise associated with or acting under him or them, or under his or their direction or control, from in any way preventing, interrupting, lessening, interfering

with or otherwise abridging or injuriously affecting (a) the use by the plaintiff of any and all of the canal water of that portion of the said Miami and Erie Canal extending from the State Dam and intake adjacent thereto, located in the Maumee River immediately south of Grand Rapids, Ohio, to the hydro-electric plant and property of the plaintiff located at Maumee, Ohio, or, (b) the flowage of water from the said river into said canal at said dam and intake; from diverting, causing or permitting to be diverted, either into said river or otherwise, and either at the said Maumee Side Cut or elsewhere, any of the water of said canal which, without such diversion, would and will be available to the plaintiff in said canal at its said hydro-electric plant and [fol. 165] property; from opening or causing or permitting to be opened, whether wholly or partially, the sluice gate located at or in the Maumee Side Cut in the vicinity of the south corporation line of the municipality of Maumee, Ohio, or any other sluice gate or passage the opening of which would or will injuriously affect either the volume or flowage of water in said portion of said canal extending between the points aforesaid; from closing or obstructing, whether wholly or partially, any gate or passage now available or used for the conveyance of water from said river into the said portion of said canal; from constructing or erecting and from causing or permitting to be constructed or erected, any bulkhead, dam or other structure the purpose or result of which would be to prevent or lessen the flow of water in any part of said portion of said canal; and from doing, suffering or permitting any other act or thing in any way violative of the rights of the plaintiff secured to it under and by virtue of the leases, agreement and supplementary lease executed by the Board of Public Works of the State of Ohio and now owner by the plaintiff, covering the right to use the waters of said portion of said canal; that upon final hearing said temporary injunction may be made perpetual, and that the plaintiff may have such other and further relief as, in equity, may be just and proper in the premises.

The Maumee Valley Electric Company, by U. G. Denman, J. M. Butler, Karl E. Burr, Its Attorneys.

State of Ohio,
Franklin County, ss:

William P. Wallace, being first duly sworn, deposes and says that he is the Vice-President of the Maumee Valley Electric Company, the plaintiff above named, and that the facts stated and allegations contained in the foregoing petition are true.

Wm. P. Wallace.

Sworn to before me and subscribed in my presence this 12th day of March, A. D. 1925, by the said William P. Wallace. G. E. Dean, Notary Public in and for Franklin County, Ohio.

[fol. 166] Stip. Ex. 21

Court of Common Pleas, Franklin County, Ohio

No. 101,344

The Maumee Valley Electric Company, a Corporation, Plaintiff,

vs.

Louis A. Boulay, Individually and as Superintendent of Public Works of the State of Ohio and as Director of the Department of Highways and Public Works of the State of Ohio, Defendant

Entry

This day this cause came on to be heard upon the application of the plaintiff, made in open court, for a temporary injunction, in accordance with the prayer of the petition, was argued by counsel and submitted to the Court upon the verified petition and the evidence; and it appearing to the Court that great and irreparable damage will result to the plaintiff from the matters and things alleged in the petition unless a temporary injunction shall issue f thwith and without notice, in accordance with the prayer of the

petition; that the commission of the threatened acts therein alleged would, during the litigation of this cause, produce great and irreparable injury to the plaintiff and that the said acts threatened to be committed and the said things threatened to be done by the defendant are in violation of the plaintiff's rights, respecting the subject of the action, and tending to render a final judgment herein ineffectual unless a temporary injunction be granted in the meanwhile, it is hereby ordered that the defendant, individually and as Superintendent of Public Works of the State of Ohio and as Director of the Department of Highways and Public Works of the State of Ohio, his agents, employees and servants and any and all persons in any wise associated with or acting under him or them or under his or their direction or control, be and they hereby are restrained and enjoined, pending the further order of this court, from in any way preventing, interrupting, lessening, interfering [fol. 167] with or otherwise abridging or injuriously affecting (a) the use by the plaintiff of any and all of the canal water of that portion of the Miami and Erie Canal extending from the State dam and the intake adjacent thereto, located in the Maumee River immediately south of Grand Rapids, Ohio, to the hydro-electric plant and property of the plaintiff located at Maumee, Ohio; or (b) the flowage of water from said river into said canal at said dam and intake; from diverting, causing or permitting to be diverted, either into said river or otherwise and either at the said Maumee Side Cut or elsewhere, any of the water of said Canal which, without such diversion, would and will be available to the plaintiff in said canal at its said hydro-electric plant and property; from opening or causing or permitting to be opened, whether wholly or partially, the sluice gate located at or in the Maumee Side Cut in the vicinity of the south corporation line of the municipality of Maumee, Ohio, or any other sluice gate or passage, the opening of which would or will injuriously affect either the volume or flowage of water in said portion of said canal extending between the points first aforesaid; from closing or obstructing, whether wholly or partially, any gate or passage now available or used for the conveyance of water from said

river into the said portion of said canal; from constructing or erecting and from causing or permitting to be constructed or erecting and from causing or permitting to be constructed or erected, any bulkhead, dam or other structure the purpose or result of which would be to prevent or lessen the flow of water in any part of said portion of said canal; and from doing, suffering or permitting any other act or thing in any way violative of the rights of the plaintiff secured to it under and by virtue of the leases, agreement and supplementary lease executed by the Board of Public Works of the State of Ohio and now owned by the plaintiff, covering the right to use the waters of said portion of said canal.

It is further ordered that this temporary injunction shall take effect upon the giving by the plaintiff of a bond in the sum of $500.00, executed by sufficient surety to be approved by the Clerk of this Court, conditioned to secure to the defendant the damages he may sustain if it be finally decided that said temporary injunction ought not to have been granted.

[fol. 168] And thereupon the plaintiff tendered to the said Clerk of this Court its bond in said sum executed by The Metropolitan Casualty Insurance Company of New York, as surety, and the same was duly approved by said Clerk.

R. P. Duncan, Judge.

Filed March 14, 1925. Harold C. Gockenbach, Clerk, by T. M. Ragland, Deputy.

The State of Ohio,
Franklin County, ss:

I, Harold C. Gockenbach, Clerk of the Court of Common Pleas within and for said County, hereby certify that the above and foregoing is truly taken and copied from the original entry now on file in my office.

Witnes my hand and the seal of said Court, this 11th day of May, A. D. 1925.

Harold C. Gockenbach, Clerk, by (Sgd.) Lucille Weibbing, Deputy. (Seal.)

[fol. 169] STIP. EX. 22

Columbus, Ohio, April 2, 1925.

To the Honorable Vic Donahey, Governor of the State of Ohio, Columbus, Ohio.

DEAR SIR:

Amended Senate Bill No. 148—Mr. Farnsworth

The following facts having reference to the above entitled bill are respectfully submitted for your consideration:

By the terms of the bill the General Assembly is proposing to abandon the portion of the Miami & Erie Canal extending from the state dam at Grand Rapids, Ohio, to a point in the Village of Maumee directly north of the so-called Maumee Side-Cut, located one and six-tenths miles south of the hydro-electric plant hereinafter referred to.

The hydro-electric plant is operated by means of water flowing through the portion of the canal above referred to.

The Maumee Valley Electric Company owns two grants in perpetuity from the State of Ohio entitling it to the use of a definite amount of the water impounded at the Grand Rapids dam and there diverted into the portion of the canal sought to be abandoned by the proposed bill. This water is used for the operation of a flouring mill located directly below the dam in the municipality of Providence, and the proposed abandonment would altogether destroy the water rights so owned in perpetuity.

The Maumee Valley Electric Company is also the owner of four leases calling for a portion of the canal water, none of which will expire for some years to come, together with a lease entitling it (The Maumee Valley Electric Company) to all of the surplus water in that part of the canal. The water is used for hydro-electric purposes.

The primary term of the latter lease expired on March 12, 1925, but the lease contains the express stipulation that it shall be renewable for an additional period of thirty years on the same terms as those contained in the lease itself, unless another bidder offers a higher rent for the water power and also agrees to certain other conditions

[fol. 170] stipulated in the lease. No such bidder has made any offer for the water rights.

When the question of a renewal of the lease was submitted to the Department of Public Works it was stated that the lease could be renewed except at an increased rental for the water rights, and on that theory the terms of the renewal were discussed and considered.

Subsequent investigation of the canal laws has convinced The Maumee Valley Electric Company that the then Board of Public Works had the full right and power to enter into the original lease for thirty years and to stipulate that the lease should be renewed upon the same terms as those contained in the original lease, including the payment of rental.

By reason of the foregoing facts, The Maumee Valley Electric Company believes and contends that the original lease now stands renewed for the period of thirty years upon the same terms and conditions, including the payment of rental, as are contained in the original lease. It suggests also that if, by reason of its renewal right, it is entitled to the use of the canal water at the rental provided for in the original lease, the State of Ohio should not now be demanding a higher rental for such use.

It believes, moreover, that such would be the opinion of the Attorney General of the State if the question were referred to him for consideration.

The abandonment of the canal as proposed by the bill would entirely destroy the water rights under discussion here. The claim is made, however, that the rights of The Maumee Valley Electric Company are protected by certain conditions and reservations in the bill. Reservations were, however, inserted in an act of the General Assembly passed on January 22, 1920, abandoning another portion of the same canal, and the City of Toledo, in whose favor the latter abandonment was made, is now claiming that notwithstanding those reservations, the owners of leases of canal water have no rights which are entitled to protection. The latter act is found in Vol. 108 Ohio Laws, Part 2, at pages 1138 to 41 inclusive.

The City of Toledo is the chief proponent of the present bill just as it was of the act last referred to, and The Maumee Valley Electric Company has no reason to believe

that its rights will be any more respected under the pro-
[fol. 171] posed bill than under the act of 1920.

The water power generated by the canal water in question is generally said to be the finest in the State of Ohio, and the electricity generated at the hydro-electric plant referred to is used for the purpose of supplying light, heat and power to the public.

The Maumee Valley Electric Company believes that it can be demonstrated that the proposed abandonment of the canal is not in any sense necessary in the interest of the water supply for the City of Toledo.

In conclusion, it is respectfully submitted that the thirty year lease of the canal water to The Maumee Valley Electric Company stands renewed upon the same terms and conditions as those applicable to the primary term of the lease, and that is the position to which the Company adheres; that apart from that consideration, the Company owns four unexpired leases of water rights which, in all good conscience, are entitled to the protection of the State; that in addition to those four leases the Company owns two grants of water rights in perpetuity, the value of which would be altogether destroyed by the proposed abandonment.

It is further respectfully submitted that for any and all of the above reasons the bill in question should receive the unfavorable action of the Chief Executive.

Respectfully submitted.

The Maumee Valley Electric Company, by —— ——,
Its Attorneys.

[fol. 172] Stip. Ex. 23

In United States District Court, Southern Ohio

No. 334. In Equity

The Maumee Valley Electric Company, Plaintiff,
vs.
George F. Schlessinger et al., Defendants

Under the stipulation between the parties hereto, plaintiff offers in evidence sections from the constitutions of Ohio and the general and special laws of Ohio listed as follows:

1. Section 1 of Article I of the Constitution of Ohio of 1802.

2. Section 12 of Article VIII of the Constitution of Ohio, as adopted in 1851.

3. Section 12 of Article VIII of the Constitution of Ohio, as amended September 3, 1912.

Acts of the General Assemblies of Ohio and Indiana and of Congress of United States

4. Act passed February 23, 1820, 18 O. L. 147, Vol 2, Chase's Statutes, page 1131, entitled: "An act respecting a navigable communication between Lake Erie and the Ohio River."

5. Act passed January 31, 1822, 20 O. L. 31, Vol. 2, Chase's Statutes, page 1220, entitled: "An act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal."

6. Act passed January 27, 1823, 21 O. L. 24, Vol. 2, Chase's Statutes, page 1255, entitled: "An act supplementary to the act", last above mentioned.

7. "An act in addition to the act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal", passed February 23, 1824, Vol. 3, Chase's Statutes, page 1963.

8. Act passed February 4, 1825, 23 O. L. 50, Vol. 2, Chase's Statutes, pages 1472-76, entitled: "An act to provide for the internal improvement of the State of Ohio by navigable canals."

9. An act supplementary to the above acts, passed January 18, 1826, Vol. 3 Chase's Statutes, page 1516.

[fol. 173] 10. "An act for the protection of the Ohio canals", passed January 31, 1826, Chase's Statutes Vol. 3, page 1525.

11. "An act to provide for the increase of the Canal Fund by the purchase and sale of real estate", passed February 7, 1826, Vol. 3 Chase's Statutes, page 1527.

12. "An act in addition to the act entitled an act supplementary to the act providing for the internal improvement of the State of Ohio by navigable canals", passed February 8, 1826, Vol. 3 Chase's Statutes, page 1528.

13. Act of the Congress of the United States, passed March 2, 1827, granting lands in the State of Ohio to the State of Indiana for construction of Wabash & Erie Canal.

14. "An act to amend the act for the protection of the Ohio canals", passed February 11, 1828, Chase's Statutes Vol. 3, page 1598.

15. An act by the Congress of the United States, passed May 24, 1828, Vol. 4 Statutes at Large, page 305, donating lands in Ohio to the State of Ohio to be sold to provide funds to construct the Miami Extension Canal from Dayton, Ohio, to Lake Erie.

16. "An act declaring the assent of the State of Ohio to the provisions and conditions of an Act of Congress", passed December 22, 1828, Chase's Statutes Vol. 3, page 1619. Through this act the Legislature of Ohio assented to and accepted the terms and conditions of the Act of Congress passed May 24, 1828.

17. "An act to authorize Canal Commissioners to examine into the practicability of extending the Miami line of canal from Mad River, near Dayton, to Defiance at mouth of Auglaize River", passed February 9, 1830, Chase's Statutes Vol. 3, page 1644.

18. "An act in addition to the several acts for the protection of the Ohio canals and for other purposes", passed February 18, 1830, Chase's Statutes Vol. 3, page 1659.

19. "An act constituting proceeds from sales of canal lands a portion of the general Canal Fund", passed February 23, 1830, 28 O. L. 61.

20. An act of the Congress of United States extending to the State of Ohio the time in which to complete the canal from Dayton to Lake Erie, passed April 2, 1830, Vol. 4 Statutes at Large, page 393.

21. "An act to provide for the purchase of water privileges", passed March 3, 1831, Chase's Statutes Vol. 3, page 1862.

22. "An act to authorize the selection, location, sale and application of the proceeds of lands granted by Congress to aid the State of Ohio in extending the Miami Canal", passed December 31, 1831, Chase's Statutes Vol. 3, page 1915, 30 O. L. 14.

[fol. 174] 23. "An act to amend the act to provide for the internal improvement of the State of Ohio by navigable canals", passed February 13, 1832, Chase's Statutes Vol. 3, page 1917.

24. Resolution by the General Assembly of the State of Indiana conveying to the State of Ohio the lands heretofore granted by Congress to the State of Indiana for construction of Wabash & Erie Canal, passed February 1, 1834.

25. Resolution by the General Assembly of the State of Ohio, passed February 24, 1834, accepting the conveyance of Ohio lands by the State of Indiana to the State of Ohio, which conveyance by Indiana was made pursuant to and under authority of Section 4 of the Act of Congress above mentioned, passed May 24, 1828, Vol. 4 Statutes at Large, page 305.

26. An act providing that all moneys arising from the sale of lands, together with the net proceeds of all tolls, fines and water rents derived from the canal north of Dayton, should be subject to Commissioners of Canal Fund, passed February 27, 1834, 32 O. L. 213.

27. An act directing the Board of Public Works of Ohio to establish the line of the Wabash & Erie Canal from the east line of the State of Indiana to suitable point into Lake Erie, and put the work under contract and carry it along as funds from the sale of land should be received or other money supplied, passed March 3, 1834, 32 O. L. 308.

28. "An act to provide for the extension and completion of the Miami Canal north of Dayton", passed March 8, 1836, 34 O. L. 331.

29. An act appropriating money for the purchase of suitable lands for hydraulic purposes, passed January 12, 1837, 35 O. L. 6.

30. An act appropriating money for purchase of lands

and developing of hydraulic power on Miami Canal from Ohio River to Defiance, passed April 3, 1837.

31. "An act relating to the management and sale of certain lands of the State of Ohio", passed March 19, 1838, 36 O. L. 85, Swan's Statutes of Ohio 1841, pages 166 to 170 inclusive.

32. "An act to provide for the protection of the canals of the State of Ohio; the regulation of the navigation thereof and for the collection of tolls", passed March 23, 1840, 38 O. L. 87, Swan's Statutes of Ohio 1841, pages 174 to 200.

33. Swan's Statutes of Ohio of 1841, pages 744 to 764 inclusive.

34. An act directing Board of Public Works to select such of the canal lands belonging to Ohio as might be nec- [fol. 175] essary for the use of water power on the Wabash & Erie Canal and the Miami Canal, passed March 7, 1842, 40 O. L. 72.

35. An act providing for the completion of all parts of the Miami Extension Canal not then under contract, passed February 28, 1843, 41 O. L. 43.

36. "An act in relation to the Miami Canal, the Miami Extension and the Wabash & Erie Canal", passed March 14, 1849, 47 O. L. 44.

37. Revised Statutes of 1880, Sections 7775 to 7779 inclusive, Bates' Annotated Statutes of 1906, Section 218-86 et seq.

38. General Code of 1910, Sections 14009 to 14013 inclusive.

39. "An act to amend Section 14009 of the General Code relating to the sale and leasing of surplus waters of the canals, feeders and dams of the State", passed March 21, 1917, 107 O. L. 418.

Leasing of Entire Public Works

40. "An act to provide for the leasing of the public works of the State", passed May 8, 1861, 58 O. L. 117.

41. Joint resolution of the General Assembly of Ohio extending the lease provided for in the above mentioned act for a period of ten years, passed April 11, 1867, 64 O. L. 330.

Abandonment Acts

42. "An act to authorize the city of Cincinnati to enter upon and occupy a part of the Miami & Erie Canal as a public highway and for sewerage purposes", passed March 24, 1863, 60 O. L. 44.

43. "An act to authorize the city of Toledo to enter upon and occupy a part of the Miami & Erie Canal as a public highway and for sewerage and water purposes", passed March 26, 1864, 61 O. L. 74.

44. "An act to provide for the vacation of the Grandville sidecut, known as the Grandville feeder, emptying into the summit level of the Ohio canal in Licking County", passed April 11, 1866, 73 O. L. 198.

45. "An act to authorize the vacation and sale of a portion of the Hocking canal", passed March 6, 1873, 70 O. L. 306.

46. "An act to provide for the abandonment of a certain portion of the Hocking canal lying eastward of the lock at the village of Chauncey, Athens County", passed April 11, 1876, 73 O. L. 168.

47. "An act to provide for the abandonment and sale of the Wabash & Erie Canal and six-mile reservoir in Paulding County", passed April 12, 1888, 85 O. L. 207.

[fol. 176] 48. "An act to abandon the Wabash & Erie Canal in Paulding County", passed March 3, 1891, 88 O. L. 72.

49. "An act to provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Co.", passed May 18, 1894, 91 O. L. 327.

50. "An act to provide for the abandonment of the Walhonding canal", passed April 27, 1896, 92 O. L. 380.

51. "An act to abandon a portion of the Miami & Erie Canal in Lucas County and to provide for the sale or lease of the same to the city of Toledo, Ohio", passed January 22, 1920, 108 O. L., part 2, pages 1138 to 1141.

52. "An act to abandon for canal purposes that portion of the Miami & Erie Canal between the Maumee River at Defiance, Defiance County, Ohio, and a point five hundred feet north of the Middletown dam, near the north corporation line of the city of Middletown, Ohio, and to provide for the leasing of certain portions of the same to cities, villages and other political subdivisions of the State and for granting of leases outside of municipalities, etc.", passed March 25, 1925, 111 O. L. 208 to 214.

53. "An act to abandon a portion of the Miami & Erie Canal in Lucas County, Ohio, and to provide for the sale of the same to the County Commissioners of Lucas County, Ohio", passed March 27, 1925, 111 O. L. 367 to 370.

54. "An act to abandon for canal and hydraulic purposes that portion of the Miami & Erie Canal from a point five hundred feet north of the State Dam, near the corporation line of the city of Middletown, Paulding County, Ohio to the present terminus of said canal at St. Bernard in the city of Cincinnati, Hamilton County, Ohio", passed April 21, 1927, 112 O. L. 388 to 390.

55. "An act to abandon a portion of the Miami & Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith", passed over the Governor's veto May 11, 1927, 112 O. L. 360 to 363.

[fol. 177] STIP. EX. 24

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 534. In Equity

THE MAUMEE VALLEY ELECTRIC COMPANY, Plaintiff,

vs.

GEORGE F. SCHLESSINGER et al., Defendants

Testimony of Harden L. Crawford, E. A. Dorszeski, and Lewis E. Ayres

HARDEN L. CRAWFORD, president of the plaintiff company would, if duly called and sworn as a witness, testify as follows:

My name is Harden L. Crawford. I have been president of the plaintiff, The Maumee Valley Electric Company, since 1913. Prior to that I was its treasurer.

The various leases in evidence here of this company were acquired by it during the time beginning with the year 1900 and ending with the year 1913. There are no other leases on water from the canal between Grand Rapids and Toledo besides the plaintiff's seven leases in evidence here and The Toledo Grain & Milling Company lease, and the grant to Peter Minor by the State of Ohio in 1842 permitting him, his heirs and assigns, to take water from the canal at the town of Providence, Ohio, above the Guard Lock or Lock No. 9 of said canal, for hydraulic power to be used in the operation of flour and sawmills at that point on the north bank of the Maumee River and just across that river opposite the Village of Grand Rapids, Ohio, where a flour mill is still operated by waters from the canal under that grant.

I investigated these properties before coming into plaintiff company and before acquiring the leases. After the Law lease we made exhaustive examinations, both as to legal situation on the leases and as to the possibilities of the physical development of the company, both by engineers and through our attorneys, and we have relied and did rely absolutely that our leases meant what they said; that the Legislative Acts, particularly that of 1902 meant what that Legislative Act said with regard to the State maintaining the canal, before we put in our money. At that time the plant was a small one, with one flume and one small waterwheel, with capacity of about 400 horse power, belted to a generator of about the same capacity.

We raised the building about double its height and installed in it 2,000 kilowatts of steam capacity, with 800 horse power of boilers, and later removed those 800 and installed two 500, making 1,000 horse power boilers in that plant. We built a complete new building to house the enlarged water end. We put two new flumes, each one of more than double the capacity of the one old flume; installed two new 750 kilowatt Allis Chalmers wheels, directly connected to generators. I refer to water-wheels and generators. We dredged the canal from Lock 45 all the way up the canal; I don't know just how far, but the cost was over $53,000 just

for dredging. This dredging was done under the supple-
[fol. 178] mentary lease introduced in evidence here. We put in new dynamos directly connected with those water-wheels. The water-wheels were directly connected to 750 kilowatt generators. The purpose of the auxiliary steam plant is to make up such deficiency as may be required in case of failure on the part of the water to generate a sufficient amount of electricity. When we first came out here, Maumee and Perrysburg were quite small, little places. They have grown now, together with the extension of those lines which came to the City of Toledo on both sides of the river, and there has been no question as to the market for all the power that plant could generate. We were about eight miles originally from the city limits. I think now the city lines come out to about a mile or a mile and a half from the plant so it would be, practically, that the city had been extended from time to time and it has come out on the River Road to within a mile and a half of our plant. If the water power were not there or was taken away, we would lose everything we put into it.

I put up the money to build the plant and am confident that if the plant is done away with I will lose my money. It will be wiped out. The only value of the plant will be the salvage value of the buildings and the junk value of the machinery.

Except at such times as there has been a break in the canal, there has never been an occasion when the water was not sufficient to run at least one wheel, at the lowest period, without steam. We have three wheels with an hourly capacity of 750 kilowatts, although that does not necessarily mean that we are using our capacity for 24 hours per day during all of the 365 days in the year. At some time in every year the water fails sufficiently to materially reduce the production of the plant. The steam standby plant was installed to take care of such emergencies. We acquired the Purdy lease, the Tryon lease, Studer lease, Paper Mill lease and Detweiler lease in order to protect our Law lease and to make available to us all of the water in the canal. In other words, we acquired those leases because the use of it by others would have prevented our using it at the plant.

Throughout all of the time that the plant has been operated by means of the water power provided for in the leases,

it has produced and is still producing electricity supplied to the public for light, heat and power purposes.

E. A. DORSZESKI (now E. A. DORSEY) would, if duly called and sworn as a witness, testify as follows:

My name is E. A. Dorszeski. I live at Chicago, Illinois. By occupation I am a member of the firm of Hagenah and Erickson, consulting engineers engaged in the appraisal of public utilities, rate investigation, appraisal of water rights for municipalities, commissions, courts and corporations. In estimating flow of water at various plants in the country, under comparable circumstances to those present in the Miami and Erie Canal between Grand Rapids and Maumee, Ohio, I have taken part and assisted, and also made reports personally on water power rights for the following Companies: Portland Railway Light and Power Company, Portland, Oregon; Pacific Power and Light Company, Portland; properties in Washington, Idaho, Montana; Alabama Power Company, operating extensive hydraulic plants in Alabama; Toronto and Niagara Power Company, operating a hydraulic plant at Niagara Falls, transmitting energy to Toronto, Canada; and the Montreal and Ontario Power Company. In my appraisal work, I have had charge and directly assisted in the appraisal of $1,750,000,000 worth of public utility properties in the United States and Canada, such property consisting of street railway, telephone, electric light, water and steam railroad properties. These were appraised in part on behalf of states, corporations and municipalities.

[fol. 179] I have inspected the canal and plant of The Maumee Valley Electric Company, including the portion of the canal from Grand Rapids to Maumee, which carries the water under discussion in this case to that plant, and have made a careful inspection of the dam, the canal, the power plant owned by The Maumee Valley Electric Company, the generating equipment contained therein and the steam plant adjacent to it. I find the flow or head of water in that portion of the canal is somewhere between 59.4 to 61 feet. I have examined records compiled by the government as to the available flow of water and such statistical data in the records of the company as to the number of kilowatt-hours generated by month for the eleven-year period ending with

1924, and in mentioning the number of kilowatt-hours generated by such records, I refer to plaintiff's Exhibit 14. I have investigated and estimated the value of the water power at the plant of plaintiff company.

I find from the reports prepared by the Government that there is available for this particular plant about 422 second feet of water. This amount of water is capable of generating approximately 10,000,000 kilowatt-hours per year. There is available a total of 536 second feet, and the difference between that amount and 422 second feet passes the plaintiff's plant and goes on down to the plant of The Toledo Grain & Milling Company in Toledo; in other words, approximately four-fifths of all the water in the canal is available to the plaintiff. Of course when the water gets so low that there is not sufficient capacity to turn over the wheels, it cannot be used. I estimated that the plant is capable of generating over a twelve-month period approximately 10,000,000 kilowatt-hours. I have estimated a reproduction cost of a plant with 2,000 kilowatt capacity to cover the necessary equipment for generating this energy. In estimating, I have only taken into consideration that part of the property owned by the company and have excluded the dam and canal which is owned by the State. My estimate shows that for $200,000, roughly, you could reproduce the electrical appliances, water-wheels, pen stocks, cabling, etc., in the plant. This plant I have estimated would require about $4,500 yearly for depreciation charge; allowing 8% return on $200,000, would mean $16,000 per year; and one per cent for maintenance, making a total fixed value charge cost of $22,500 a year. I find that it costs about 1.8 mills to generate a kilowatt-hour at this plant. This is for labor, rental charges, miscellaneous supplies and lubrications used in operating the hydraulic plant. The fixed charges for depreciation, return on investment and maintenance, would amount to 2.3 mills per kilowatt-hour on this generation. I have also estimated a steam plant of sufficient capacity to generate 10,000,000 kilowatt-hours per year. I find that an approximate cost of a steam plant would be $275,000. Depreciation on the plant—as this class of property depreciates more rapidly—is $11,000; return on the investment, 8% of $275,000 is $22,000 a year; maintenance $5,500 a year, making a total charge for deprecia-

tion, return on the investment and maintenance $38,500 per year, or 3.9 mills per kilowatt-hour. I have estimated that energy on the basis of coal costs in the Toledo district and surrounding points where this energy may be transmitted, would be 3.8 mills per kilowatt-hour, or a total of 7.7 mills to supply a kilowatt-hour of steam energy. Taking this on the basis of 10,000,000 kilowatt-hours, would show a charge of $41,000 for hydraulic energy and $77,000 for steam energy; the difference between the two being $36,000 in favor of the hydraulic energy, or the saving that could be made by hydraulic plant as compared with a steam plant. Capitalizing the $36,000 on the basis of 8% would give a hydraulic power value of $450,000. This value is exclusive of any physical property. That represents my judgment based on these calculations as a minimum value of the hydraulic power.

Stoppage or cessation of water now flowing through the canal would destroy the investment that is made in the hydraulic part of the plant and destroy the investment in the steam plant, which is a part of the investment there. It would affect the steam plant because it would be uneconomical to operate a steam plant of that capacity if not run in [fol. 180] connection with a hydraulic plant. It is too small and could not compete with the energy turned out by more modern and larger plants. This steam plant is constructed to take up the load of the hydraulic plant if insufficient amount of water in the canal to carry the load. Because of this hydraulic plant's proximity to the City of Toledo, it is more valuable than a hydraulic plant located say within twenty or fifty miles or even farther from the center, or market for the energy. This plant is located where the market is right at its back door and it is possible to sell this energy generated there without putting it through transformers. The investment, therefore, is far less than in a plant farther away.

I cannot say what the production of kilowatt-hours at this plant is at present, but over an eleven-year period the average has been 7,700,000. I examined the plant but would not be able to give you any definite figure on the investment unless I appraised it in detail. I know it is considerable. It is in excess of $200,000.00. In basing my estimate of 10,000,000 kilowatt-hours on the flow of the canal,

I assume that amount of water available for transmitting will be there and I am basing my estimate on 422 second feet out of the 536 second feet that are available.

Other leases above this plant which would take part of the water from the canal would reduce the flow and reduce the estimate. In making this estimate, I did not take into consideration any water that might be necessary for navigation. I took the available water in the canal at the present time and considered the canal as a stream for furnishing hydraulic power and the amount of water in it would give this amount of hydraulic energy.

LEWIS E. AYRES would, if duly called and sworn as a witness, testify as follows:

My name is Lewis E. Ayres. I live at Ann Arbor, Michigan. By profession, I am a civil and hydraulic engineer. I am a member of the firm of Ayres, Lewis, Norris & May. I am a graduate of the University of Michigan, civil engineering course. I have been engaged primarily during the past seventeen years in the designing and construction of water power plants and water-works plants, appraisals of such properties, and reports upon properties of that character. I have had during this time responsible and intimate connection with seventeen projects in Michigan, Indiana, Iowa, Minnesota, involving dams or power houses or both. Among these I would name power plant of the City of Sturgis, Michigan, on the St. Joe River; five dams and power houses on the Huron River near Detroit for the Edison Company; five of the engine power houses for Detroit Edison Company; three dams for Great Northern Power Company at Duluth; a dam for Des Moines Electric Company, Des Moines, Iowa; power house reconstruction for the W. Pulp and Paper Company at Sartel, Minnesota; design of dam on Mississippi River for United States Government; small hydraulic plant at Syracuse, Indiana; power plant for the Shenbayane Electric Company, Shenbayane, Michigan; one for Alpena Power Company, completed last year; one at Big Rapids, Michigan; one for Great Lakes Power Company, Caro, Michigan; and we are building one now for City of Bellaire, Michigan, and finishing one for Detroit Edison Company.

In appraising water power companies under Professor H. E. Riggs, I appraised the Edison Sioux Electric Company's properties. I had charge of the appraisal of the electrical department for the Central District of Chicago in 1915 and 1916; made or had connection with appraisals of the five plants of the Edison Company; plant of the Alpena Power Company; properties of the Western Hydro-Electric Company in Michigan; reports on water values, values of water power, and comparative values of steam, for Great Northern Power Company; and a number of other smaller ones.

[fol. 181] I am president of the Detroit Section of American Society of Civil Engineers and am member of several national engineering societies: American Association Civil Engineers; American Water Works Association; Michigan Engineering Society, etc.

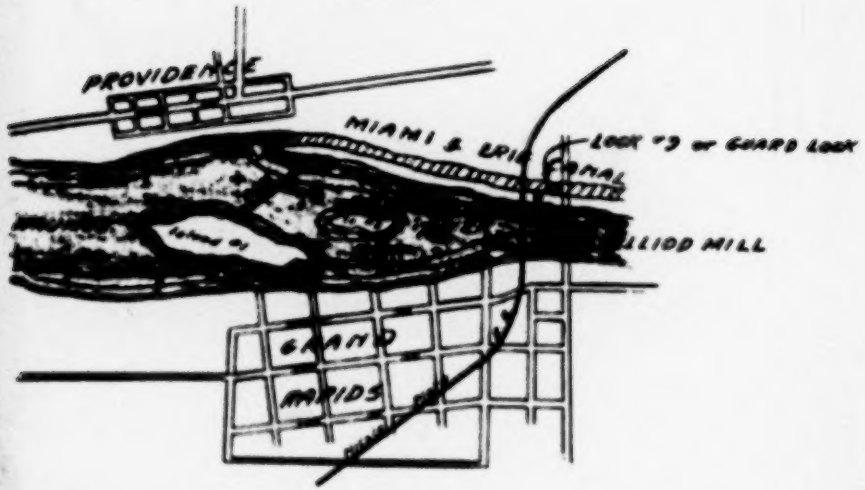
I have made an inspection of the water power of the Maumee Valley Electric Company along the stretch of the Miami and Erie Canal, extending from Grand Rapids to the plant of that company. I made no direct measurement of the flow of the water. I obtained the head available from the records of the company and took in my computations sixty feet as an average head. I computed the value of that water power and used as basis for determining the value of these water rights a so-called comparative method, or a value based upon what other willing buyers have paid for water rights under comparable conditions in our similar markets and of about the same size and based my value on so much per theoretical horse power of water power available, using a figure of $150 for theoretical horse power. Used that figure because in cases I know about under similar conditions, where the water rights are a smaller proportion of the total investment, that amount has reasonably been paid. The smaller the amount of money necessary in construction work, the larger the value in water rights for a property of good size. If I were estimating the value of this property here for the purpose of purchase or sale, $150, in my opinion, per horse power is a minimum figure. In arriving at a valuation of this property, I used an average head of sixty feet and an average flow of 420 cubic feet per second, because that is the average flow that appears to be available from the records of the com-

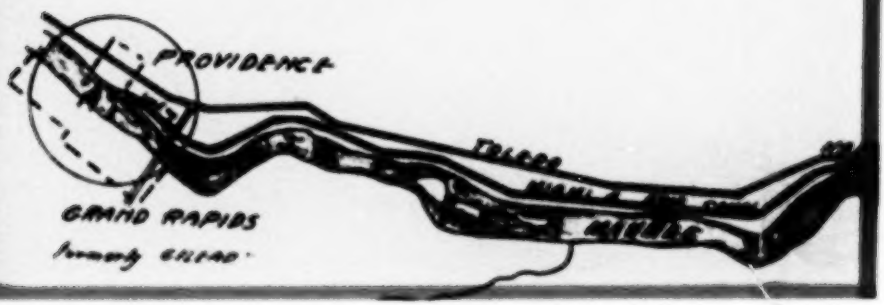
pany. That head and flow produce a theoretical horse power of something over 2700 based on a similar plant that I have in mind in particular, now being completed by Detroit Edison about same distance from Detroit market and related about the same way to the larger power plants of the Edison Company. They are just finishing a plant which has a theoretical horse power of 1870, the water rights of which have cost them just about an even $150 per theoretical horse power. In this plant, the construction involved is about, physical construction, $600,000; and the water rights about $280,000. This plant is about twenty miles from Detroit and produces its current in conjunction with the steam plants of Detroit Edison Company.

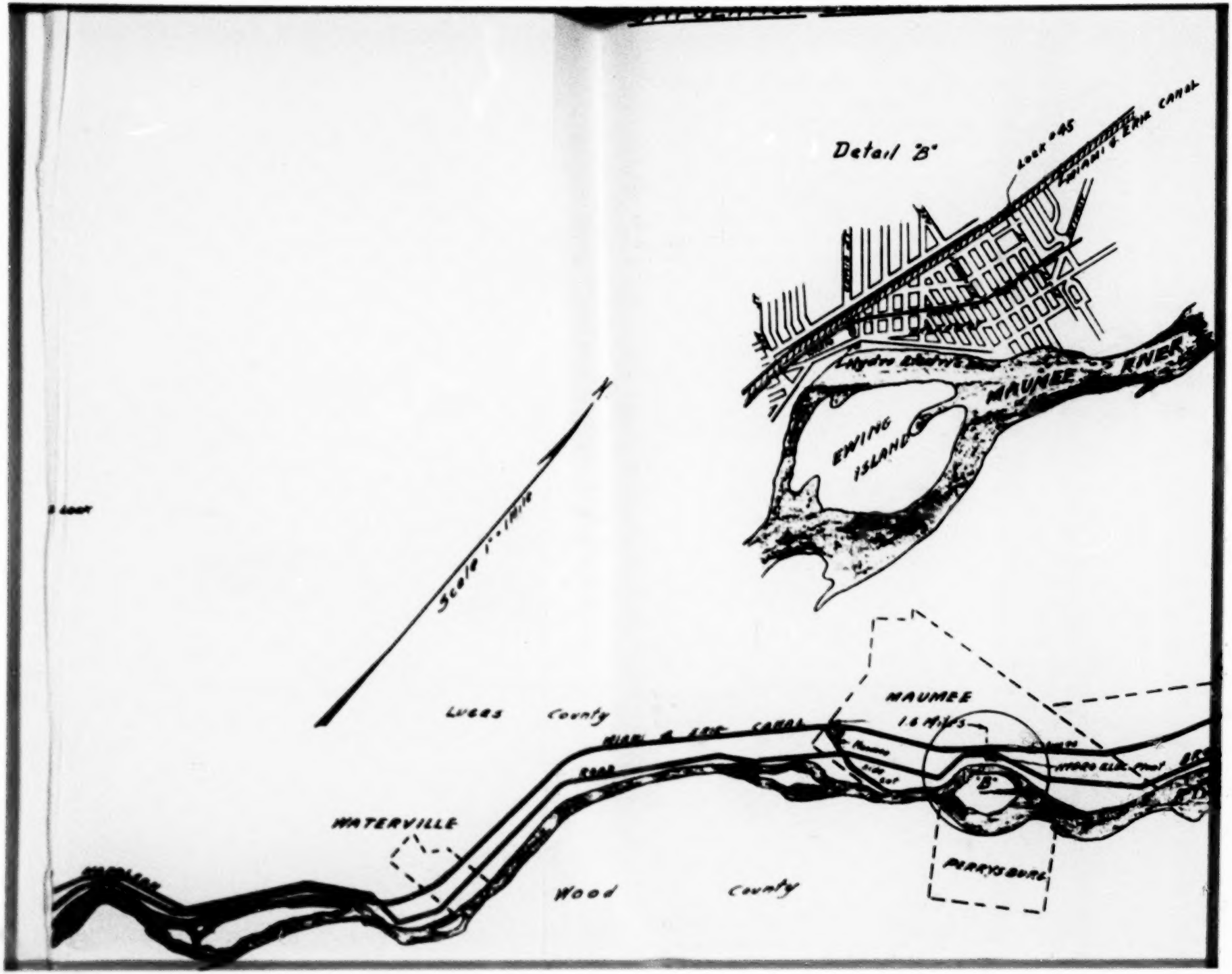
This plant in compariosn is similarly located as regards market, as regards competition or steam power plant production, and produces about the same amount of power, more power, in fact, than the Detroit Edison plant. This plant, based on that flow, should produce with improved machinery at least 10,000,000 kilowatt-hours annually; and the average annual output of the particular plant to which I refer is, roughly, 8,000,000 annually. The same comparison could be applied to the other plants on the Huron River of the Edison Company and lead to similar results. It is a basis of what a reasonable buyer is willing to pay for this right under similar conditions. The figure of $400,000, it seems to me, in my judgment is a minimum on that basis for the value of the water power rights at the site of The Maumee Valley Electric Company, and that is exclusive of plant proper.

My estimate is not based on an uninterrupted flow of water at a normal rate of 422 second feet. You never have a water power plant with absolutely an uninterrupted flow. It is based on the average flow annually of 420 second feet and an average head of 60 feet. I have undertaken to consider the factor that during the summer months the canal might be practically dried up so that no water would be available for hydraulic power, and have also considered the records of the flow of the river realizing that it get very low at times in the summer, and realizing also the flow of the seepage in the dam above. The same thing is true in the plants upon which I base my values. And it is based on the assumption that the canal will always be able to carry the

Detail "A"


PROVIDENCE
MIAMI & ERIE CANAL
LOCK "3" or GUARD LOCK
ALLIED MILL
GRAND RAPIDS


PROVIDENCE
GRAND RAPIDS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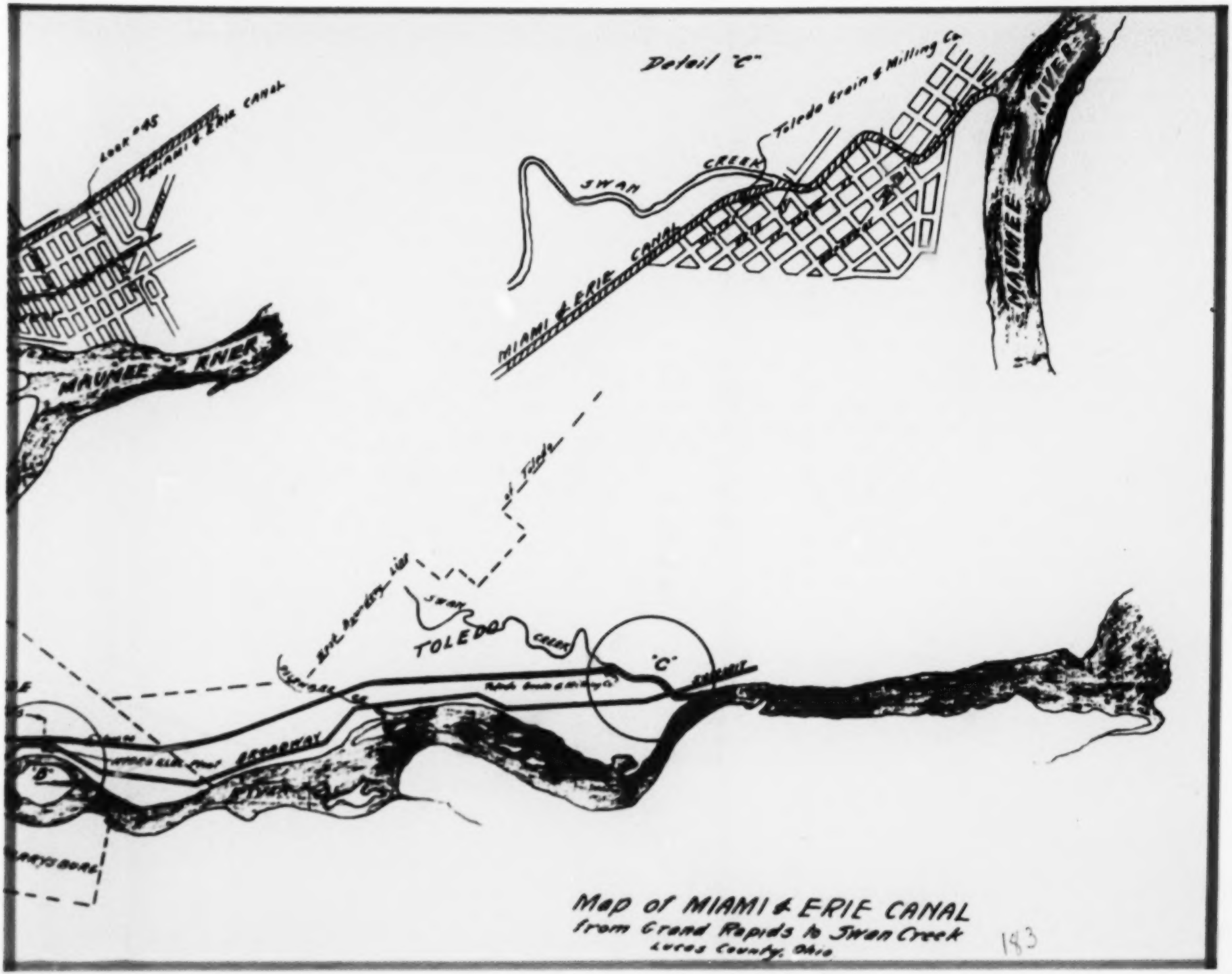
LOCK #45
MIAMI & ERIE CANAL
MAUMEE
EWING ISLAND
Scale 1" = 1 Mile
Lucas County
MAUMEE
16 Miles
MIAMI & ERIE CANAL
ROAD
WATERVILLE
Wood County
PERRYSBURG



Map of MIAMI & ERIE CANAL
from Grand Rapids to Swan Creek
Lucas County, Ohio

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amount of flow necessary to get that average, 420 second feet. In making this estimate, I have not considered it as a canal for purposes of navigation, but as a mill-race for [fol. 182] purpose of hydraulic power at least to the extent of 420 second feet. I understand that to be their rights. That is not all the water available there. The canal has a capacity flow, from the measurements that have been made and the records I have seen, something over 500 second feet, and some of that water, I did not measure it further, but a considerable amount of water was flowing on by Lock 45 further down the canal. If there were water leases above by which water was taken for hydraulic power, it would reduce the flow available at that point, of course.

The foregoing statements by Messrs. Crawford, Dorsey and Ayres, respectively, are accepted and admitted in evidence in lieu of their oral testimony to the facts therein stated, and with the same effect as though they had appeared and orally tsetified thereto in this cause.

(Here follows Stipulation Exhibit 25, marked side folio page 183)

[fol. 184] IN UNITED STATES DISTRICT COURT

No. 534. In Equity

THE MAUMEE VALLEY ELECTRIC COMPANY, Plaintiff,

vs.

GEORGE F. SCHLES(S)INGER, as Superintendent of Public Works and Director of the Department of Highways & Public Works of the State of Ohio; The County Commissioners of Lucas County, Ohio; The Village of Maumee, Ohio; The Village of Waterville, Ohio, and The City of Toledo, Ohio, Defendants

Before Donahue, Circuit Judge; Hickenlooper and Hough, District Judges

(Under authority of Section 266 Judicial Code)

OPINION—Filed Sept. 7, 1928

HOUGH, District Judge:

The plaintiff, a corporation, was organized for, and is in the business of generating and supplying electricity to the public for light, heat, and power purposes, and in connection with that business is chartered to hold property and acquire and hold leases and contracts for water to be used in the generation of electricity through hydro-electric power plants. It holds by assignment and under its charter powers owns, certain leases and grants from the state providing for the use of surplus water from the Miami & Erie Canal. Of the seven leases and grants so owned, the Purdy Quit Claim grant of December 8th, 1845, acquired April 27th, 1910, the Studer lease of November 13th, 1906 acquired [fol. 185] December 11th, 1913, the Tyron and the Maumee Paper Company leases, dated April 3rd, 1903 and acquired respectively in 1904 and 1912, are only indirectly involved in this case, the water authorized to be used under their terms being at places and in manner different from the location and method used at plaintiff's plant. The other three leases, that of Robert J. Law, dated March 12th, 1895, acquired September 11th, 1900, that to George K. Detweiler, dated February 20th, 1901, acquired January 25th, 1916,

and the supplemental lease to the Law lease, dated December 10th, 1910, deal with hydraulic power in the vicinity of plaintiff's plant at Maumee, and constitute the real basis of its claims.

These leases were made for terms of thirty years, with provisions for renewal. The Law lease conveyed the surplus water of the canal between Providence and Toledo, not needed for navigation, and not at the time of conveyance under lease. At the time of the assignment of the Law lease, to-wit: in 1900, the plaintiff company acquired land and constructed a small hydro-electric plant thereon at the location of its present plant. In 1910, when the supplemental lease was made, in order to secure an increase in the flow of water, the plaintiff agreed to remove the rock bars in the canal as well as other obstructions on the 18 mile level [fol. 186] between Grand Rapids and Lock No. 45, raise the banks of the canal in certain places, and pay the expense of a proper patrol system and pay an increased rental for the use of water granted under the terms of the Law lease. The plaintiff having also acquired the Tyron lease and the Purdy grant, then reconstructed and rebuilt its hydro-electric plant, greatly increased its capacity, enlarged the water flume, deepened and widened the canal from Grand Rapids to Lock No. 45, and made other improvements at a cost and expense of more than $50,000.

The defendant, Schlesinger, as Superintendent of Public Works and Director of Highways & Public Works of the State of Ohio, is the real party defendant in interest by virtue of the mandate of the General Assembly of Ohio contained in the Act of May 11th, 1927, 112 O. L., 360,—the constitutionality of which is raised in this case. The Act purports to abandon that portion of the Maumee & Erie Canal in Lucas County, Ohio, for both canal and hydraulic purposes, commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly to a point where said canal joins with the Maumee River, being a section of canal 16.5 miles long, and designated for the purposes of this case as Lineal Part No. 2. The Act [fol. 187] provides that the title of lands and waters be reserved to the state, and that the same shall be held by the state for the purpose of constructing thereon a highway, at such time in the future as it may find proper and convenient.

It also provides that all leases heretofore granted for canal or hydraulic purposes on Lineal Part No. 2 shall become null and void on and after sixty days from the taking effect of the Act. It places Lineal Part No. 2 under the supervision and control of the State Highway Director, and commands that official within sixty days from the taking effect of the Act, to drain the water from it and prevent the water of the Maumee River from flowing into or through the abandoned portion. The defendants other than the Director of Highways are interested and proper parties, although not necessary parties.

The plaintiff's plant, for the operation of which the leased water is used, is located at Maumee, Ohio, between the canal and the Maumee River, adjacent to a section of the canal known for the purposes of this case as Lineal Part No. 1, beginning at the northerly terminus of Lineal Part No. 2, and being 8.85 miles in length. The situs of the plant is 1.6 miles northerly of the junction of Lineal Parts Nos. 2 and 1,—(the water of the canal flows northerly).

[fol. 188] The plaintiff company in its bill seeks injunctive relief against the Superintendent of Public Works and Director of the Department of Highways & Public Works of the state, enjoining him from carrying out the mandates and commands of the General Assembly as expressed in the Act passed by it May 11th, 1927, for the reasons among others as claimed, that the Act is contrary to section 10 of Article I of the constitution of the United States, and section 1 of Article XIV of the amendments to that constitution, as impairing the obligation of plaintiff's leases, agreements and grants, and is depriving plaintiff of its property without due process of law, based upon the contention that the Act does not contemplate the payment of a just compensation to plaintiff, and does not take into account plaintiff's vested property rights.

The case is finally submitted to the court upon the issues joined by the pleadings, affidavits, the written stipulation of facts, with the exhibits attached, and the arguments of counsel.

It is conceded that at the time of the execution of the earliest of the leases (Law lease, 1895) now held by the plaintiff company, navigation had practically disappeared from the canals of Ohio, and that at the time it secured such

lease and the other leases and grants, navigation had wholly [fol. 189] ceased, and has never been resumed. It is further conceded that the leases are entered into under authority of law. And it must be conceded by reason of final judicial decree, that the Law lease as modified by the supplemental lease of December 10th, 1910, had been renewed for a term of thirty years from March 12th, 1925, (The Miami Valley Elevtric Co. v. Toledo, et al., 12 F., (2nd) 98), and the legal effect of the Purdy grant acquiesced in for a long period of years is established. (State ex rel. v. The Middletown Hydraulic Co., 114 O. S., 437.)

The history of the Ohio canal system begins with the passage of the initial Act by the General Assembly in 1820, and from that time until 1849 there were passed numerous Acts creating a canal system and providing for the acquirement of the necessary land by gift, grant, and condemnation, and for the construction and operation and regulations for its use. The system was completed in 1845 and was operated for public transportation by the state or its lessees until about the year 1895. In the process of the development of the legislative machinery for the canal system, as early as 1825, and again in 1828, and many times subsequently, the legislature recognized the propriety of and authorized the sale of surplus water of the canals. The policy and prac- [fol. 190] tice of leasing "surplus water" "not necessary for navigation," and the accepting of grants reserving to the grantor "water rights," thus early recognized, extended to all the canals of the Ohio system, and continued to be recognized by the state and the users of surplus water until this controversy arose, and discloses clearly the sovereign encouragement to the development of hydraulic energy, before and after the usefulness of the canals for navigation had ceased because of the development and popularity and general use of other and more rapid means of transportation.

The wisdom of the plan conceived by the early fathers of building a system of water highways over the state "to promote the agricultural, manufacturing and industrial interests of the state" at its formative period, and the operation of the same as a great vehicle of transportation for fifty years, was entirely justified by the unprecedented development and growth of the state and its industries during that time.

The year 1863 marked the beginning of a series of Acts of the General Assembly abandoning various sections of the canal "for canal purposes." This legislative surrender of portions of the canal and the authorization of the [fol. 191] use thereof for other purposes, gave rise to litigation in connection with the intervening rights of individuals holding water rights.

Navigation was of course the prime object and original main purpose in the building of the canals. It was a public purpose and exercised by the state in its governmental and sovereign capacity. During the time of the operation and use of the canals for transportation purposes, the use of water for hydraulic power purposes was merely incidental and subordinate to the main purpose. It accordingly became the established law, that when it became inexpedient or inadvisable to continue the canal for navigation purposes, or when some other public purpose, though local in nature, became more important, that part so affected might be abandoned without regard to and notwithstanding the water power leases. Hubbard v. Toledo, 21 O. S., 379; Elevator Co. v. Cincinnati, 30 O. S., 629; Fox v. Cincinnati, 33 O. S., 492, 104 U. S., 783, 785; Vought v. Ry. Co., 58 O. S., 123; Compare, Kaukauna Co. v. Green Bay, etc., 142 U. S., 254, 282; Hoagland v. Ry. Co., 111 Ind., 443.

The sale of surplus water, subordinate in the first instance and for many years thereafter to the primary purpose and use of the canals, gradually became a contributor [fol. 192] to the accomplishment of the maini purpose of "promoting the agricultural, manufacturing and industrial interests of the state" in the development of hydraulic power. It becomes obvious that this element of the state's business has become important when we consider that it has gone on without interruption, paralelling the business of navigation until that business outlived its usefulness, and continuing for thirty years thereafter as the chief if not the sole use to which the canals have been put, and returning to the state a revenue of eighteen millions of dollars,—nine millions of which were derived from water rentals of the Miami & Erie Canal alone. The revenue itself indicates a business of substantial proportions, to which private capital of necessity was attracted in the

building and enlarging of power plants, and to which corresponding property rights and vested interests have become involved.

All the leases herein involved were made pursuant to authority given by Act of the General Assembly in 1840. This statute remained unchanged until its amendment in 1917, and was recognized as meeting all modern requirements by its incorporation in the General Code of Ohio in 1910. Sections 14009 et seq., Ohio General Code; 38 O. L. 87. The leases were also made subsequent to the time that travel and transportation by canal had become too [fol. 193] slow for the then modern conditions. The position of the state had changed from that of operating the canal as a navigable highway, to the operation of a great power plant for the sale of power and water to the public. State ex rel v. The Middleton Hydraulic Co., 114 O. S., 437.

Viewed in the light of changed and altered circumstances brought about by modern progress and development, facts and situations basically the same may assume a new and different aspect. The relationship between the state and the lessees and grantees of water rights, in defining their respective rights, may call for solution differently, if the altered or changed condition warrants. When engaged in the business of contracting water privileges for the manufacture of power and energy as a principal business, the state acted in its proprietary capacity. It is a commercial proprietor, bound in its contractual engagements the same as individuals. State ex rel. v. Middletown Hydraulic Co., supra. That a state or subdivision thereof may act in such capacity, and when so doing is amenable to all the rules of law which bound private individuals, is well established in Ohio and elsewhere. South Carolina v. U. S., 199 U. S., 437; Vicksburg v. Vicksburg Water Works Co., 206 U. S., 496; Los Angeles v. Gas & Electric Corporation, 251 U. S., [fol. 194] 32; State ex rel. v. Middletown Hydraulic Co., supra; State v. Executors, 3 O. S., 309; R. R. v. State, 83 O. S., 251.

The leases and grants owned by the plaintiff are subject to a present day construction and interpretation in relation to the surrounding facts and circumstances in harmony with the present relationship of the parties. Ordinarily such writings are considered contracts. The state

we may now say in its proprietary capacity has treated them as contracts in accepting rentals, making new leases, contracting with lessees and owners for improvements, permitting the plaintiff to expand its plant by extensive improvements, and permitting the Law lease to be renewed under its own terms. Believing as we do that they assume the dignity of contracts, little difficulty is found in the solution.

The Supreme Court of the United States in the Dartmouth College case (Trustees v. Woodward, 17 U. S., 517), held that a charter granted by the British Crown to the Trustees was a contract within the meaning of the clause of the constitution which declares that no state shall make any law impairing the obligation of contracts, and that the Act of the legislature of New Hampshire altering the charter in a material respect was void under the constitution.

[fol. 195] In the case of Power Company v. City of Akron (240 U. S., 462), the court had before it a bill of complaint alleging that a municipality does not intend to institute proceedings to condemn, but does intend to take plaintiff's property rights without compensation, and that in so doing it purports to be acting under an ordinance which violates the contract clause of and the 14th amendment to the Federal Constitution, held that it was necessary under such allegations to take jurisdiction and determine the merits.

In Russell v. Sebastian, (233 U. S., 197) the same court having before it a franchise of a public service corporation and a municipal ordinance of the City of Los Angeles adopted in pursuance to the amendment to the California constitution, held that the franchise was a contract, and that the ordinance was ineffectual under the contract clause of the Federal constitution to deprive the corporation, which had accepted the offer of the state contained in the constitution before the amendment of its right to continue to lay pipes in the streets of the city.

In the case of Hayes v. Port of Seattle (251 U. S., 233), the rule is announced that a bill setting up obligations of contract with the state and charging that they were impaired by subsequent state legislation, presented a controversy under the constitution conferring jurisdiction [fol. 196] upon the District Court.

And in the case of City of Los Angeles vs. Los Angeles Gas & Electric Corporation, (251 U. S., 32), the same principle was again announced, wherein it was said that a franchise to use the streets for supplying the city and its inhabitants with electric light, acquired under the California constitution before the amendment of 1911, conveys contract rights which the city is not at liberty to destroy, and the property employed in their exercise cannot be taken by the city without due process of law—the payment of compensation. This same case also recognized the principle, that there is a distinction between the powers of a city when acting in its governmental capacity, and those which belong to it in its proprietary or quasi private capacity.

Equity will furnish the remedy in this case, as no adequate remedy at law exists. And while the action of the legislature may be construed as a repudiation of the state's contracts as distinguished from an action that only impairs its obligation, as treated in the Seattle case, supra, yet the law of Ohio furnishes no remedy at law under either the "contract clause" or the "due process" clause of the con-[fol. 197] stitution.

Connected with the discussion and conclusion arrived at above, it should be noted that in 1925 the General Assembly of Ohio passed an Act (111 O. L. 367) abandoning the same section (Lineal Part 2) as was attempted to be abandoned under the Act of May 11th, 1927. The former expressed a clear and unambiguous intention on the part of the legislature to protect the rights of the lessees of water. The statutory expressed intention to so protect, in this act (entirely absent in the later act) certainly is a recognition by the state of the contractual relationship between it and the lessees of water, and the abandonment, in the latter Act, of the same section of canal as was abandoned in the former, raises the query: How effective, if at all, was the re-abandonment feature of the latter Act?

Moreover, in 1920 an Act was passed (108 O. L., Part 2, 1138) abandoning Lineal Part No. 1 of the canal, and providing for the appraisement of the abandoned section, giving the City of Toledo an option of purchasing or leasing the same, but in either event, in clear and unequivocal

terms, protecting the rights of existing leases and the rights of the owners thereof to renewal. The City of Toledo decided to exercise the option of purchase, and in accordance therewith, and in accordance with the terms of the Act, and in due course received a deed for the abandoned portion, subject to the rights of the lessees of water. The [fol. 198] City of Toledo failed to carry out the provisions of the Act in reference to the adjustment and payment of compensation to the lessees, and upon its taking action for the purpose of "cutting off" the water from the abandoned section, this plaintiff instituted its suit in equity against the City of Toledo, and finally procured a permanent injunction against the city from so cutting off or draining the water from such section. (Maumee Valley Electric Co. v. City of Toledo, 13 F. (2nd,) 98.)

Obviously the carrying out of the mandate by the Superintendent of Public Works and the Director of the Department of Highways and Public Works, under the provisions of the Act of May 11th, 1927 (112 O. L. 360), in draining the water from Lineal Part No. 2 and preventing the water of the Maumee River from flowing into or through the abandoned portion (the water of the canal flowing northerly and passing from Lineal Part No. 2 to Lineal Part No. 1) would effectually nullify the force and effect of the final decree of the Court of Appeals. (Maumee Electric Co., v. City of Toledo, supra.) This point is raised by appropriate allegations in the bill and in the prayer wherein injunction is asked, "as impairing the obligations of a contract entered into between the State of Ohio and the City of Toledo in behalf of and for the benefit of plaintiff and as depriving plaintiff of its property rights under said contract without due process of law."

[fol. 199] The effect of the re-abandonment of Lineal Part No. 2, the legislative nullification of a judicial decree, the good faith or want of good faith of the legislature in legislating away the force and effect of such decree, and the remedy due plaintiff growing out of the contractual relationship between the State and the City of Toledo, are questions that may well seriously address themselves to a court of equity, but in view of the position taken by the court and the conclusions drawn upon the other angle of

the case, it is unnecessary to pass upon these considerations at this time.

Injunction allowed. See decree.

Donahue, Circuit Judge; Hickenlooper, District Judge, concur.

[fol. 200] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERLOCUTORY INJUNCTION ORDER—Filed Sept. 24, 1927

In this cause, it appearing,

1. That a temporary restraining order, heretofore on July 29, 1927, was granted by Honorable Benson W. Hough, District Judge in said Court, which temporary order has been extended through successive ten-day periods and is now in force restraining the defendants as set out in said temporary order;

2. That plaintiff has made application to said District Judge for an interlocutory injunction against the defendants restraining and suspending the enforcement, operation and execution of a statute of the State of Ohio upon the ground of the unconstitutionality of said statute as shown by the allegations of the verified bill of complaint in this suit in which temporary, interlocutory and final injunctive relief is prayed and that said District Judge has called to his assistance to hear and determine said application Honorable Maurice H. Donahue, Circuit Judge of the Sixth United States Judicial Circuit, and Honorable D. C. Westenhaver, District Judge for the Eastern Division of the Northern United States Judicial District of Ohio;

[fol. 201] 3. That since the institution of this suit defendant herein, the City of Toledo, Ohio, has instituted an action in the Court of Common Pleas of Lucas County, Ohio, to complete an appropriation and condemnation, and thereby determine the valuation of, and amount of money to be paid plaintiff herein for its water rights and privileges as described in the bill of complaint in this suit under its water leases and contracts therein set out and the plain-

tiff herein since the institution of said suit in said Court of Common Pleas has instituted a suit in said court through which will be determined the question of power in said City of Toledo so to appropriate and condemn said water rights and privileges;

4. That the parties plaintiff and defendant in this suit desire that the questions involved in said actions pending as aforesaid in said Court of Common Pleas be determined before a final hearing in this suit, if such final hearing shall become necessary, and defendants in this cause agree that plaintiff, on the allegations of the verified bill and affidavit on file in this cause in this court, is entitled to have the status quo as fixed by said temporary restraining order preserved and continued through interlocutory injunction until final hearing and determination on the pleading filed and pleadings or motions to be filed and any evidence that may be submitted on final hearing if such final hearing shall be necessary, said defendants being given proper extension of time for filing answer or motions prior to such hearing, and said defendants consenting and agreeing that such interlocutory injunction may be granted for the purposes aforesaid.

5. That the hydro-electric plant referred to in the verified bill has been constructed at great cost and expense and is of great value for the purposes therein set forth and that said claimed water rights of plaintiff referred to in said bill, if valid, are of great value, and that if defendants should proceed to carry out and should carry out the threats, as alleged in said bill, plaintiff's said rights and said plant will be destroyed and great and irreparable injury, damage and loss will come to plaintiff by reason thereof;

[fol. 202] 6. That all defendants herein and the Governor and Attorney General of Ohio have notice of and know the contents of this order and consent to the entry thereof:

Now, therefore, it is hereby ordered that the defendants and each of them and all of their officers, agents, associates, appointees and employees, respectively, be and they hereby are temporarily enjoined from in any way preventing, interrupting, lessening, interfering with, or otherwise abridging

or injuriously affecting (a) the use by the plaintiff of any and all of the canal water of that portion of the Miami and Erie Canal extending from the State dam and the intake adjacent thereto, located in the Maumee River immediately south of Grand Rapids, Ohio, to said hydro-electric plant and property located at Maumee, Ohio; (b) the flowage of water from said river into said canal at said dam and intake; (c) from diverting, causing or permitting to be diverted, either into said river or otherwise and either at the said Maumee side-cut or elsewhere, any of the water of said canal which, without such diversion would and will be available to the plaintiff in said canal at said hydro-electric plant and property; (d) from opening or causing or permitting to be opened, whether wholly or partially, the sluice gate located at or in the Maumee side-cut in the vicinity of the south corporation line of the municipality of Maumee, Ohio, or any other sluice gate or passage, the opening of which would or will injuriously affect either the volume or flowage or water in said portion of said canal extending between the points first aforesaid; (e) from closing or obstructing, whether wholly or partially, any gate or passage now available or used for the conveyance of water from said river into said portion of said canal; (f) from constructing or erecting and from causing or permitting to be constructed or erected, any bulkhead, dam or other structure or obstruction the purpose or result of which would be to prevent or lessen the flow of water in any part of said portion of said canal; and from doing, suffering or permitting any other act or thing in any way violative of the rights of the plaintiff secured to it under and by virtue of the leases, agreement and supplementary lease executed by the Board of Public Works of the State of Ohio and now owned by the [fol. 203] plaintiff, covering the right to use the waters of said portion of said canal, all until the final hearing and determination of this cause, as prayed for in the verified bill, or until the further order of this court.

It is further ordered that the bond heretofore given in this court upon said temporary restraining order shall stand released upon and this interlocutory injunction shall take effect upon the giving by the plaintiff of a bond in the sum of $5,000.00, executed by sufficient surety to be approved by the Clerk of this court, conditioned to secure to

the defendants the damages they may sustain if it be finally decided that said interlocutory injunction order ought not to have been granted.

And thereupon the plaintiff tendered to said Clerk of this court its bond in said sum executed by The Metropolitan Casualty Insurance Company of New York, as surety, and the same was duly approved.

It is further ordered on the application of defendants that the time for them respectively to file answers or motions to the bill of complaint in this cause be and it is hereby extended, but such answers or motions shall be filed and the issues made up at least ten days before the final hearing in this suit.

D. C. Westenhaver, District Judge. Maurice H. Donahue, Circuit Judge for the Sixth Circuit. Benson W. Hough, District Judge.

[fol. 204] In United States District Court

[Title omitted]

Acknowledgment of Service of and Consent to Temporary Injunction Order

To the Honorable Benson W. Hough and the Honorable the Judges called by him to his assistance on the application of the plaintiff for interlocutory injunction in the above cause:

We, the undersigned, respectively have received copies of the attached interlocutory injunction order, note the contents thereof and consent to its entry in this court for the time and purposes set out in said order.

The City of Toledo, Ohio, by F. M. Dotson, Its Director of Law and Solicitor. The Villages of Maumee and Waterville, Ohio, by F. M. Dotson, Their Solicitor. Roy Davis, Ralph E. Farnsworth, George Hoffman, Commissioners of Lucas County, Ohio, by Leroy W. Hunt, Prosecuting Attorney of Lucas Co., Ohio. George F. Schlessinger, As Supt. of Public Works, etc., A. V. Donahey, Governor of Ohio, by Edward C. Turner, Attorney General of Ohio.

[fols. 205-207] Bond on interlocutory injunction for $5,000, approved and filed September 24, 1927; omitted in printing.

[fol. 208] In United States District Court

[Title omitted]

Motion for Substitution of Party Defendant—Filed Sept. 8, 1928

Now comes the plaintiff and respectfully represents and shows to the court that since the institution of the above entitled suit on July 28, 1927 and during the pendency of said suit said defendant, George F. Schlessinger, resigned from the office of Director of Highways of the State of Ohio on June 15, 1928 and on that day ceased to hold said office, and plaintiff further represents that on said date of June 15, 1928 one Harry J. Kirk was duly appointed to said office of Director of Highways of the State of Ohio; that he thereupon duly qualified as such officer under the laws of Ohio and since then he has been and he still is the duly appointed, qualified and acting Director of Highways of the State of Ohio as the successor in said office to said George F. Schlessinger, resigned as aforesaid.

Plaintiff further represents that there are grave and difficult questions involved in said suit and that there is substantial need for continuing and maintaining said cause and obtaining an adjudication of the questions involved in order that plaintiff's property rights of great value involved in said suit may be properly and finally determined.

Wherefore, plaintiff respectfully moves the court for an order permitting and directing said suit to be continued [fol. 209] and maintained against said Harry J. Kirk, as the Director of Highways of the State of Ohio and successor in that office to said George F. Schlessinger, resigned as aforesaid.

U. G. Denman, and Karl E. Burr, Solicitors for plaintiff.

To the Honorable the Judges in the above entitled cause in the United States District Court for the Southern District of Ohio, Eastern Division:

The undersigned, Harry J. Kirk as Director of Highways of the State of Ohio, through his counsel, the Attorney Gen-

eral of Ohio, duly authorized under the laws of Ohio, hereby this 6th day of September, 1928, acknowledges receipt of a copy of the above motion by the plaintiff in the above entitled cause, voluntarily enters his appearance as a defendant in said cause, and hereby expressly consents to the granting of said motion and that said cause be continued and maintained against him as the successor in the office of the Director of Highways of the State of Ohio to George F. Schlessinger resigned, in order that an adjudication of the questions involved in said cause may be obtained.

Harry J. Kirk, Director of Highways of the State of Ohio, by Edward C. Turner, Attorney General of Ohio.

[fol. 210] In United States District Court

[Title omitted]

Order Substituting Harry J. Kirk as Party Defendant—Filed Sept. 8, 1928

This day this cause came on to be heard on the motion of the plaintiff for an order to permit and direct the above entitled cause to be continued and maintained by the plaintiff against Harry J. Kirk, as successor in the office of the Director of Highways of the State of Ohio to his predecessor in that office, George F. Schlesinger resigned, and the court being fully advised in the premises finds that said George F. Schlesinger resigned from the office of Director of Highways of the State of Ohio on June 15, 1928 and on that day ceased holding said office as such officer; that said Harry J. Kirk is the duly appointed, qualified and acting Director of Highways of the State of Ohio as the successor in said office to said George F. Schlesinger, resigned as aforesaid; that said Harry J. Kirk has been duly notified of the filing and pendency of said motion; that he expressly consents to the granting thereof by this court and to a substitution of himself as such Director of Highways of the State of Ohio as a defendant in said cause in the place of his predecessor in said office, George F. Schlesinger, resigned as aforesaid; that there is substantial need for continuing and maintaining said cause and obtaining an adju-

dication of the questions involved therein; and that said above entitled cause should be permitted to be continued [fol. 211] and maintained by the plaintiff against said Harry J. Kirk as such successor in said office of Director of Highways of the State of Ohio.

Now, therefore, it is ordered that said cause be and the same hereby is continued and shall be maintained by the plaintiff against said Harry J. Kirk as Director of Highways of the State of Ohio and as a defendant in this cause and that all orders heretofore entered by this court in said cause be and they hereby are continued and shall stand against said Harry J. Kirk as defendant as aforesaid in this cause and as the successor to said George F. Schlesinger in the office of the Director of Highways of the State of Ohio until the further orders of this court.

Maurice H. Donahue, Circuit Judge. Benson W. Hough, District Judge.

[fol. 212] In United States District Court

No. 534. In Equity

The Maumee Valley Electric Company, Plaintiff,

vs.

George F. Schlesinger, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, and Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio; the Village of Maumee, Ohio, and the Village of Waterville, Ohio, and the City of Toledo, Ohio, Defendants

Final Decree—Filed December 3, 1928

This cause, coming on to be heard at this term on the pleadings, proofs and arguments of counsel, was thus heard before and was determined by Honorable Maurice H. Donahue, United States Circuit Judge, and Honorable Benson W. Hough and Honorable Smith Hickenlooper, United States District Judges, constituted and sitting as a court

in this cause under Section 380 of Title 28 of the United States Code, formerly Section 266 of the United States Judicial Code; and thereupon, upon consideration thereof, former defendant, George F. Schlesinger, having resigned from and quit the office of Director of the Department of Highways of the State of Ohio on June 15, 1928, and Harry J. Kirk having been thereupon duly appointed under the laws of Ohio as Director of the Department of Highways of the State of Ohio, and having been duly substituted as a defendant in this cause as such Director of the Department of Highways of said State succeeding said former defendants, George F. Schlesinger, resigned as aforesaid, and said Harry J. Kirk, as Director of Highways as aforesaid, having voluntarily entered his appearance in this cause as a defendant therein succeeding said George F. Schlesinger, resigned as aforesaid, and said Harry J. Kirk being since such substitution and entry of appearance as afore-
[fol. 213] said and now the duly appointed, qualified and acting Director of the Department of Highways of the State of Ohio, it is ordered, adjudged and decreed as follows, viz:

1. That on the issues joined in this cause the court finds for the plaintiff and against the defendants, including therein that the provisions of the Act of the General Assembly of the State of Ohio, hereinafter specifically described, mentioned and referred to, declaring or attempting to declare all leases, agreements and grants of, with and from the State of Ohio for water to be taken thereunder from that portion of the Miami and Erie Canal specifically described in said act, to be null, void and of no effect, and directing the State Highway Director of Ohio to drain the water out of said portion of said canal and to prevent the waters of the Maumee River from flowing into said portion of said canal and granting permission to the defendants to fill up said canal and obstruct the flow of the waters therein, are contrary to and in contravention of the Constitution of the United States and therefore null, void and of no effect with respect to and as affecting, or intended to affect, the leases, agreements and grants of the plaintiff in this cause, which leases, agreements and grants are specifically mentioned, described and referred to in the Bill of Complaint and the record of this cause;

2. And that the defendant, Harry J. Kirk, Director of Highways as aforesaid, and each of said other defendants and his and their successors respectively and his and their officers, agents, associates, appointees and employees and their respective successors in office and position, be and they hereby are, during the existence of plaintiff's said leases, agreements and grants, enjoined (a) from in any way or by any means draining or, except by the plaintiff, causing or permitting to be drained from that portion of the Miami and Erie Canal, or any part thereof, described as commencing at a line across said canal and the lands thereof just below the head of the Maumee side-cut near Maumee, Ohio, and extending thence southwesterly over and along said [fol. 214] Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's Survey, to and including the point or place where such canal joins with the Maumee River on the northwesterly side thereof and above or southwesterly from the Grand Rapids, Ohio State Dam in Providence Township, Lucas County, Ohio, and being that portion of said Miami and Erie Canal as described and referred to in Section 1 of an Act of the General Assembly of Ohio, entitled, "An Act to abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith", passed May 11, 1927, and found on page 360 to 363 inclusive of Volume 112 of the Laws of Ohio, any of the waters of said canal which, except for such draining, would and will be available to the plaintiff in this cause for its use, to the amount provided and called for in plaintiff's said leases, agreements and grants, namely, the Robert J. Law, Trustee Lease, the Agreement and Supplementary Lease the Thomas W. Studer Lease, the A. C. Tryon Lease, The Maumee Paper Company Lease, the George K. Detwiler Lease and the James Purdy Quit-claim Grant to the State of Ohio, each and all of which are particularly mentioned, described and referred to in the Bill of Complaint and the record of this cause; and (b) from doing, or causing to be done, any act, matter or thing in any way, or by any means, with respect to said Maumee River, or said portion above described of said Miami and Erie Canal, that would prevent or in anywise interfere with or obstruct the continuous flow

into or throughout or on northeasterly beyond said portion above described of said canal of any of the waters of or from said Maumee River or of said portion of said canal which, except for such prevention, obstruction, or interference, would and will be available to the plaintiff in this cause for its use, to the amount provided and called for in plaintiff's said leases, agreements and grants.

It is further ordered, adjudged and decreed that the plaintiff have and recover from the defendant, Harry J. [fol. 215] Kirk, as Director of the Department of Highways of the State of Ohio, its costs herein expended, taxed at $—, for which execution is hereby awarded.

Smith Hickenlooper, District Judge. Benson W. Hough, U. S. District Judge.

Approved: Edward C. Turner, Attorney General, and Albert M. Calland, Special Counsel, and Joseph A. Godown, Special Counsel, Solicitors for Defendant Kirk. U. G. Denman and Karl E. Burr, Solicitors for Plaintiff.

[fol. 216] In United States District Court

[Title omitted]

Petition for Appeal to the Supreme Court of the United States—Filed December 20, 1928

The defendants herein, conceiving themselves aggrieved by the decree made and entered on the 3d day of December, 1928, in the above entitled cause, do each severally hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and pray that cost bond on appeal be fixed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

George W. Ritter, Director of Law; Martin S. Dodd, Assistant Director of Law, Solicitor for the Defendant The City of Toledo, Ohio. Edward C. Turner, Attorney General of Ohio; A. M. Calland,

and J. A. Godown, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, Prosecuting Attorney of Lucas County, Ohio, Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio. George W. Ritter, Solicitors for the Defendant The Village of Maumee, Ohio. George W. Ritter, Solicitors for the Defendant The Village of Waterville, Ohio.

[fol. 217] In United States District Court

[Title omitted]

Assignment of Errors—Filed December 20, 1928

Now come the defendants herein and severally file the following assignment of errors upon which they will severally rely upon the prosecution of the appeal herein from the decree of this Honorable Court, dated December 3, 1928:

1. That the District Court erred in decreeing the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, to be in contravention of and contrary to the Constitution of the United States so as to deprive plaintiff of rights without due process of law under leases and agreements referred to in the final decree of said District Court.

2. That the District Court erred in decreeing the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, so as to impair the obligations of agreements and leases between plaintiff and the State of Ohio referred to in the final decree of said District Court [fol. 218] in contravention of and contrary to the Constitution of the United States.

3. That the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-

12, inclusive, of the General Code of Ohio, is not in contravention of or contrary to the Constitution of the United States.

4. That the decree herein is contrary to the law.

Wherefore, the defendants severally pray that said decree be reversed.

George W. Ritter, Director of Law, and Martin S. Dodd, Assistant Director of Law, Solicitors for the Defendant The City of Toledo, Ohio. ——— ———, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Edward C. Turner, Attorney General of Ohio; A. M. Calland, and J. A. Godown, Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio. George W. Ritter, Solicitors for the Defendant The Village of Maumee, Ohio. George W. Ritter, Solicitors for the Defendant The Village of Waterville, Ohio.

[fol. 219] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed December 20, 1928

On application of defendants, it is ordered that an appeal to the Supreme Court of the United States from the final decree herein be, and the same is hereby allowed, that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of one thousand dollars ($1,000.00).

Benson W. Hough, Judge of the United States District Court, Southern District of Ohio.

[fols. 220-229] Bonds on appeal for $1000, approved and filed December 20, 1928, and January 3, 1929, omitted in printing.

[fol. 230] Citation, in usual form, showing service, on U. G. Denman and Karl E. Burr, filed January 3, 1929, omitted in printing.

[fol. 231] In United States District Court

[Title omitted]

Praecipe for Transcript of Record—Filed Dec. 20, 1928

To the Clerk:

Please prepare transcript of record on appeal in the above entitled cause for the Supreme Court of the United States, and include therein the following:

1. Title page.
2. Caption.
3. Bill of complaint.
4. Temporary restraining order filed July 29, 1927.
5. Bond of plaintiff.
6. Order extending temporary restraining order filed August 19, 1927.
7. Order extending temporary restraining order filed August 29, 1927.
8. Order extending temporary restraining order filed Sept. 8, 1927.
9. Order extending temporary restraining order filed Sept. 17, 1927.
10. Answers to Bill of Complaint.
11. Stipulation and agreement between the parties plaintiff and defendant on the evidence and the stipulation exhibits attached thereto numbered 1 to 25 both inclusive.
12. Opinion of the court.
13. Order granting interlocutory injunction filed September 24, 1927, and acknowledgment of service thereof and consent thereto.
14. Bond of plaintiff.
15. Motion for and consent to the substitution of Harry J. Kirk as party defendant.
16. Order substituting Harry J. Kirk as party defendant, filed September 8, 1928.
17. Final decree of the court.

18. Petition for appeal filed by defendants.

19. Assignment of errors filed by defendants.

20. Order by court allowing appeal and fixing amount of appeal bond.

21. Bonds filed by defendants.

22. Copy of citation and acknowledgment of service thereof.

[fol. 232] 23. Præcipe for transcript of record.

24. Stipulation re certification of record.

25. Clerk's certificate showing what portions of the record are included by request of each party.

George W. Ritter, Martin L. Dodd, Solicitors for the Defendant The City of Toledo, Ohio. Edward C. Turner, Attorney General of Ohio, A. M. Calland, J. A. Godown, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Herman A. Kenezes, Assistant Prosecuting Attorney; Leroy W. Hunt, Prosecuting Attorney of Lucas Co., Ohio, Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio. George W. Ritter, Solicitors for the Defendant The Village of Maumee, Ohio. George W. Ritter, Solicitors for the Defendant The Village of Waterville, Ohio.

Service of the foregoing Præcipe acknowledged this 3rd day of January 1929. All parts of the record desired by Appellee, The Maumee Valley Electric Co., are named in the Præcipe.

U. G. Denman and Karl E. Burr, Solicitors for The Maumee Valley Electric Company, Appellee.

[fol. 233] In United States District Court

[Title omitted]

Stipulation re Certification of Record—Filed Jan. 3, 1929

In accordance with the General Rules of this court, it is hereby agreed by and between the parties of their respective counsel that the record as presented to the Clerk by the

printer may be certified by the Clerk, as required by law, as a true, full and complete copy of the original pleadings, papers, exhibits and orders used on the trial of this cause, as set forth in the praecipe for transcript, without further comparison by the Clerk.

George W. Ritter, Martin L. Dodd, Solicitors for the Defendant The City of Toledo, Ohio. Edward C. Turner, Attorney General of Ohio, A. M. Calland, J. A. Godown, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Herman G. Kenezee, Asst. Pros. Atty.; Leroy W. Himes, Pros. Atty. of Lucas County, Ohio, Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio. George W. Ritter, Solicitors for the Defendant The Village of Maumee, Ohio. George W. Ritter, Solicitors for the Defendant The Village of Waterville, Ohio. U. G. Denman, Karl E. Burr, Solicitors for the Plaintiff, The Maumee Valley Electric Company.

[fols. 234 & 234½] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 235 & 235a] In United States District Court

[Title omitted]

Order Enlarging the Time for Docketing Case and Filing Record—Filed in Supreme Court Feb. 2, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 16th day of January, 1929.

Benson W. Hough, District Judge.

[fols. 235b & c] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING THE TIME FOR DOCKETING CASE AND FILING RECORD—Filed in Supreme Court Feb. 2, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 2nd day of February, 1929.

Benson W. Hough, District Judge.

[fol. 235d] [File endorsement omitted.]

[fol. 236] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF NECESSARY PARTS OF THE RECORD—Filed Feb. 16, 1929

The appellants contend that the act of the General Assembly of Ohio, passed May 11, 1927, and found in 112 Ohio Laws, page 360, sections 14178-14178-12, inclusive, of the General Code, does not

(a) deprive plaintiff of any property or rights without due process of law;

(b) impair the obligation of any contract growing out of the leases, agreements and grants of the appellee.

Appellants' contention is based on the following:

In constructing and maintaining the Miami and Erie canal, as a part of the general canal system of the State of Ohio, the State of Ohio acted in a sovereign or governmental capacity. The leases of water from said canal for hydraulic power purposes were entirely incidental and subordinate to the man purpose and were, therefore, also acts in a sovereign or governmental capacity.

[fol. 237] Until the General Assembly of the State of Ohio determined and declared that the Miami and Erie canal, or any part thereof, should no longer be maintained, it continued to be a canal and the maintenance thereof continued to be a sovereign or governmental function. The actual

cessation of transportation on the canal did not change its character. It continued to be a canal until the General Assembly of Ohio, by its act of May 11, 1927, declared that the property occupied by the canal should be devoted to another public purpose, to-wit, the construction of a highway.

All leases for hydraulic power purposes made from the time the canal was constructed until the General Assembly, by its act of May 11, 1927, declared the necessity of abandoning the canal and devoting the property to another public purpose, were made by the state in its sovereign or governmental capacity, and were all subject to the sovereign or governmental power of the state to abandon and discontinue the canal and use the property for other public purposes.

The State, having the right to abandon the canal for navigation purposes, upon the passage of the Act of May 11, 1927, had the right to withdraw the water from the canal without liability to appellee.

The State, having by the Act of May 11, 1927, declared the necessity of abandoning the canal, is required to return the water to the Maumee River at the point where the water is now run into the canal, so that the water will flow in its natural water course, namely, the Maumee River, through the Villages of Waterville and Maumee, and a part of the City of Toledo.

The leases from the State of Ohio to the appellee were executed and delivered after the Supreme Court of Ohio and the Supreme Court of the United States had determined that the leases of surplus water of the canal would not im-[fol. 238] pose upon the State an obligation to keep up the canal for the sole purpose of meeting the requirements of such leases, that the State was not required to maintain the canal for navigation for a longer period than public necessity seemed to require, that whenever the public necessity no longer required the canal it might be abandoned, and if abandoned, the water might be withdrawn altogether, and that the withdrawing of the water from the canal pursuant to abandonment created no liability in favor of the owners of leases, except to forego the further collection of rents or refund a reasonable portion of so much of the rents as had been paid in advance.

The State, by receiving rents on account of water leases, cannot thereby change to a public purpose the incidental use of supplying of water to holders of the leases; such incidental use of the canal is a private use as distinguished from a public one and continues as such notwithstanding the acts of any officers of the State.

The State, by its having made the leases and having accepted the rentals thereunder, cannot, in the absence of legislation expressly so declaring, change the public purpose of a canal from "navigation" to "furnishing water pursuant to water leases," even though the use of the canal for navigation purposes had been discontinued by the public.

The abandonment of the canal for navigation could not result from the lack of use thereof by the public, but must result from legislative enactment by the State, first declared by the act of May 11, 1927, as to the part of the canal here involved. The leases in question were executed under and pursuant to 38 Ohio Laws, 87, 113, enacted March 23, 1840. Pertinent sections are sections 20, 21, 22 [fol. 239] and 23 of Chapter 23, Swan's Statutes of Ohio, 1841 (shown without change in sections 218-86-87-88-89 of Bates Revised Statutes, Fifth Edition, Sections 14009-10-11-12, General Code of Ohio, 1910), from which time until 1894 the canal was used by the general public for navigation purposes.

The authority granted to the Board of Public Works by 38 Ohio Laws, 87-113, cannot be enlarged by implication as a result of the change of conditions after the enactment thereof by the General Assembly.

Therefore:

The appellee has no vested right to continue the use of the surplus water from said canal after the abandonment and discontinuance thereof by the state and has no property right therein for which it is entitled to compensation.

The sovereign or governmental power of the state to abandon or discontinue the Miami and Erie canal was a part of the leases, agreements and grants to the appellee, and the act of the General Assembly abandoning and discontinuing the canal is in accordance with those leases,

agreements and grants and does not impair any provision thereof.

Appellants think the following parts of the record are necessary for the consideration of the points above set out:

1. Title page.
2. Caption.
3. Bill of complaint.
4. Temporary restraining order filed July 29, 1927.
5. Bond of plaintiff.

[fols. 240 & 241] 6. Order extending temporary restraining order filed August 19, 1927.

7. Order extending temporary restraining order filed August 29, 1927.
8. Order extending temporary restraining order filed September 8, 1927.
9. Order extending temporary restraining order filed September 17, 1927.
10. Answers to Bill of Complaint.
11. Stipulation and agreement between the parties plaintiff and defendant on the evidence and the stipulation exhibits attached thereto numbered 1 to 25 both inclusive.
12. Opinion of the court.
13. Order granting interlocutory injunction filed September 24, 1927.
14. Bond of plaintiff.
15. Motion for and consent to the substitution of Harry J. Kirk, as party defendant.
16. Order substituting Harry J. Kirk, as party defendant, filed September 8, 1928.
17. Final decree of the court.
18. Petition for appeal filed by defendants.
19. Assignmnt of errors filed by defendants.
20. Order by court allowing appeal and fixing amount of appeal bond.
21. Bonds filed by defendants.
22. Copy of citation and acknowledgment of service thereof.
23. Praecipe for transcript of record and acknowledgment of service thereof.

24. Stipulation re certification of record.
25. Certification of transcript of record.

Respectfully submitted.

Gilbert Bettman, Attorney General; Joseph A. Godown, Special Counsel, Solicitors for the Appellant Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio. George W. Ritter, Solicitors for the Appellants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio. George W. Ritter, Solicitor for the Village of Maumee, Ohio, the Village of Waterville, Ohio, and the City of Toledo, Ohio.

Appellee, The Maumee Valley Electric Company, through its counsel, hereby acknowledges service of the above Statement of Points and Designation of Necessary Parts of the Record in the above entitled cause, this 11th day of February, 1929, and said appellee, through its said counsel, designates the same parts of the record in said cause for printing on the appeal as are above designated by appellants.

The Maumee Valley Electric Company, Appellee, by U. E. Denman, and Karl E. Burr, Its Solicitors and Counsel.

[fols. 242-244] [File endorsement omitted.]

Endorsed on cover: File No. 33,983. Southern Ohio D. C. U. S. Term No. 674. Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, etc., et al., appellants, vs. The Maumee Valley Electric Company. Filed February 4th, 1929. File No. 33,983.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING THE TIME FOR DOCKETING CASE AND FILING RECORD—Filed in Supreme Court April 12, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 16th day of February, 1929.

Benson W. Hough, District Judge.

[File endorsement omitted.]

IN THE

Supreme Court of the United States

No. 674.

OCTOBER TERM, 1928.

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY C. EVANS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO, THE VILLAGE OF MAUMEE, OHIO, AND THE VILLAGE OF WATERVILLE, OHIO, AND THE CITY OF TOLEDO, OHIO,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division.

STATEMENT OF CLAIM AS TO JURISDICTION UNDER RULE No. 12 OF THIS COURT.

Appellants appeal to this court from a permanent injunction order declaring Sections 14178 to 14178-12, in-

clusive, of the General Code, passed May 11, 1927, by the general assembly of Ohio, 112 Ohio Laws, 360, 363, to be repugnant to and in contravention of the Constitution of the United States and enjoining the performance by an officer of the state of Ohio of duties imposed upon him by certain laws of that state, which injunction was granted by three judges in the District Court of the United States, southern district of Ohio, to appellee, pursuant to a bill in equity filed in said court on July 29, 1927 (Rec., p. 1). On September 24, 1927, the court, consisting of three judges, granted an application of the appellee for an interlocutory injunction prayed for pending a final hearing of the cause for permanent injunction (Rec., p. 200).

The cause thereafter came on for final hearing on the merits, pursuant to the issues joined by the several answers of appellants before Hon. Maurice H. Donahue, United States circuit judge of the sixth circuit, the Hon. Benson W. Hough and Hon. Smith Hickenlooper, district judges for the southern district of Ohio.

On September 7, 1928, said court, constituted as aforesaid, announced its written opinion (Rec., p. 184), finding in favor of the appellee, The Maumee Valley Electric Company, permanently enjoining the superintendent of public works and the director of highways and public works, a state officer, from the enforcement of such statutes on the ground that the statutes were unconstitutional. The superintendent of public works and director of highways and public works is an officer of the state of Ohio appointed pursuant to Sections 154-1, 154-3, 154-4, 154-40, 404, 411 and 412 of the General Code of Ohio.

The appellee in the bill of complaint set forth in detail the ownership by it of certain water rights evidenced by agreements and grants in certain leases to it or its predecessor from the state of Ohio, of which it was the assignee thereof, by virtue of which it claimed the right to take water from the Miami and Erie canal at the village of Maumee, and alleged that the superintendent of public works and director of the department of highways and public works of the state of Ohio, pursuant to the provisions of said act of the general assembly, would, unless restrained from so doing, drain the water out of the portion of the canal which is abandoned by the act.

Under the terms of the act such portion of the canal was abandoned, all leases of any character thereon were declared void within sixty days after its effective date and the canal property turned over to the superintendent of public works and director of the department of highways and public works of the state of Ohio for highway and park purposes.

On December 3, 1928, said court entered a final decree (Rec., p. 210), adjudging that said act of the general assembly of Ohio, in so far as it provided for cancellation and termination of the leases from the state of Ohio to appellee, and authorized and directed the appellant, the superintendent of public works and the director of the department of highways and public works of the state of Ohio, to drain the water from said canal prior to the expiration of the terms of said leases, was a taking of the property of the appellee in violation of and in contravention to provisions of the United States Constitution,

and enjoining the appellant, Harry J. Kirk, as superintendent of public works and director of the department of highways and public works of the state of Ohio as well as other appellants from in any way or by any means draining or, except by the plaintiff, causing or permitting to be drained from that portion of the Miami and Erie canal, or any part thereof, described as commencing at the guard lock, so-called, and otherwise known as lock No. 9 and lock No. 44 of said canal, and extending thence southwesterly over and along said Miami and Erie canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, to and including the point or place where said canal joins with the Maumee river on the northwesterly side thereof and above or southwesterly from the Grand Rapids, Ohio, state dam in Providence township, Lucas county, Ohio, and being a part of that portion of said Miami and Erie canal as described and referred to in Section 1 of an act of the general assembly of Ohio, entitled "An act to abandon a portion of the Miami and Erie canal in Lucas county, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith," passed May 11, 1927, and found on pages 360 and 363 inclusive of Volume 112 of the laws of Ohio, any of the waters of said canal which, except for such draining, would and will be available to the plaintiff in this cause for its use to the amount provided and called for in plaintiff's said lease, agreement and grant expiring on December 19, A. D. 2004, as aforesaid; and from doing, or causing to be done, any act, matter or thing in any way or

by any means with respect to said Maumee river, or said part above described of said Miami and Erie canal as extending from said guard lock No. 9 to and including the point or place where said canal joins with said Maumee river, that would prevent or in anywise interfere with, or obstruct, the continuous flow into or throughout the part of said canal described as aforesaid, of any of the waters of or from said Maumee river or of said part of said canal which, except for such prevention, obstruction or interference, would and will be available to the plaintiff in this cause for its use to the amount provided and called for in plaintiff's said lease, agreement and grant expiring as aforesaid.

On December 20, 1928 (Rec., p. 216), defendants in said District Court (appellants here) filed a petition for appeal to this court, which was duly allowed by the District Court and an order issued accordingly fixing the amount of the appeal bonds (Rec., p. 219). Thereafter the District Court, by several orders, enlarged the time for the docketing of the appeal and the filing of the record thereof with the clerk of this court to February 16, 1929. On February 4, 1929, appellants docketed this cause and filed the record thereof with the clerk of this court.

Upon the statutory jurisdiction of this court to review this cause upon appeal, we call attention to Section 380, United States Code, Title 28, Section 380 (Judicial Code, Section 266, as amended), as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or exe-

cution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: **Provided, however,** that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: **Provided,** that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order

> granting or denying, after notice and hearing, an interlocutory injunction in such case. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

In reference to the cases appealable to this court under the provisions of Section 266, Judicial Code, as amended, Mr. Justice Brandeis, in the case of In re Buder, 271 U. S., 461 (70 L. Ed., 1036) at page 465, directs attention to the purpose of a paragraph added at the end of Section 266, Judicial Code, by amendment, as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

and then further adds:

> "As so amended, Section 266 also permits a direct appeal to this court from the final decree in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges."

In reference to cases reviewable in this court by direct appeal from the District Court, in the case of Clerk, et al. v. Poor, et al., 274 U. S., 54, in the headnote, it is said:

> "The final judgment of the District Court, three judges sitting, which dismisses the bill challenging the constitutionality of a state statute and seeking to enjoin its enforcement, is reviewable in this court upon appeal, under Judicial Code, Section 266, as amended by act of February 13, 1925, when an in-

terlocutory injunction has been applied for and a restraining order issued. (p. 556.)''

From the nature of the case, and it appearing that a state officer has been permanently enjoined from carrying out the provisions of an act of the general assembly of Ohio, declared by the District Court to be repugnant to the provisions of the Constitution of the United States, we think it is manifest that the final decree, rendered by the court below on the merits, is one from which a direct appeal lies to this court.

Respectfully submitted.

GILBERT BETTMAN,
Attorney General,
L. F. LAYLIN,
JOSEPH A. GODOWN,
Solicitors for Appellants.
GEORGE W. RITTER,
Toledo, Ohio,
Solicitor for Toledo, Waterville and Maumee.
LEROY W. HUNT,
Toledo, Ohio,
Solicitor for Lucas County Commissioners.

IN THE

Supreme Court of the United States

No. 674

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, ET AL.,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal From the District Court of the United States, Southern District of Ohio, Eastern Division

MOTION OF APPELLANTS TO ADVANCE

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Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

MOTION OF APPELLANTS TO ADVANCE

Now come the appellants in the above entitled cause and move that this case be advanced for an early hearing.

In support of their motion appellants make a brief statement of the matter involved and the reasons relied upon for the advancement of the hearing of this cause.

STATEMENT OF MATTER INVOLVED

This cause is here on appeal from a decree of the District Court (three judges sitting) of the United States for the Southern District of Ohio by which appellant Kirk, an officer of the State of Ohio, was enjoined from draining the water from a portion of the Miami and Erie Canal in pursuance of Sections 14178 to 14178-12 inclusive, of the General Code of Ohio, enacted May 11, 1927, 112 Ohio Laws 360-363, on the ground that the performance by him of said duties would be the taking of property of the appellee without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, and impaired obligations under certain leases and agreements of the State of Ohio leasing to the appellee water from the Miami and Erie canal used by appellee for hydraulic power, and an agreement resulting from the covenants of a deed from the State of Ohio to the City of Toledo conveying to it a part of the Miami and Erie Canal northerly of that part abandoned by the Act of May 11, 1927, in which deed it was agreed that the City of Toledo should compensate appellee for its rights under its leases if the City of Toledo should deprive the appellee thereof, by virtue of the Act of the General Assembly of Ohio, authorizing the execution of said deed enacted January 23, 1920. Like injunction against other appellants was ordered by the decree of the District Court. The aforesaid Act of the

General Assembly of Ohio, passed May 11, 1927, declared that said canal be abandoned, that all leases for canal or hydraulic purpose be null and void sixty days after the passage of the Act, and directed the Director of Highways of the State (appellant Kirk) to drain the water from the abandoned portion of the canal and to prevent the water of the Maumee River from flowing into or through the abandoned part of the canal; by virtue of Sections 2 and 3 of the aforesaid Act the State of Ohio reserved unto itself all title to lands and waters which at the time of the passage of the Act were the property of the State of Ohio occupied by any part of the Miami and Erie Canal, which further provided that the same should forever be held by the State of Ohio in fee simple, and held for the purpose of constructing upon said lands a highway.

Appellants contend that the aforesaid Act of the General Assembly of May 11, 1927, is valid, does not deprive the appellee of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, and that said Act does not impair the obligations of any agreements of the State of Ohio, in violation of the Constitution of the United States, relying upon the principle: that the statutes of the State of Ohio authorizing the execution of said leases provided for certain conditions which for many years have been interpreted to mean that in leasing the surplus waters of the canals of the state there was a reservation of the right to resume the privilege of the use of the water whenever the state deemed it necessary for navigation purposes; that a subsequent statute granting a part of the canal for a public highway

amounted to a rescission of the lease; that such steps did not deprive the lessee of any rights without due process and without just compensation and are not void under the Constitution of the United States; and further that every lessee of power take his lease and put up his improvements with full notice of the reserved right on the part of the state to discontinue its canal and stop his supply of water.

Fox vs. Cincinnati, 104 U. S. 783, affirming
Fox vs. Cincinnati, 33 O. S. 492.
Hubbard vs. Toledo, 21 O. S. 379.
Elevator Co. vs. Cincinnati, 30 O. S. 629.
Voight vs. Railroad Co., 58 O. S. 123.

REASONS RELIED ON FOR ADVANCEMENT

Appellant, City of Toledo, on December 28, 1922, pursuant to an Act of the General Assembly of Ohio, passed on January 22, 1920, 108 Ohio Laws, Part 2, pages 1138 to 1141, inclusive, purchased the title to the canal lands, from a point in the City of Toledo southerly to the Maumee River side-cut, a distance of 45,683 feet. The conveyance made pursuant to the provisions of said Act which provided that the City of Toledo should pay to any lessees of the State of Ohio a fair compensation for the loss of water to which they are entitled in the event lessees are under the terms of said Act deprived of their water privileges.

The City of Toledo having proposed to withdraw the water from said canal, appellee herein, as the holder of the water power leases, in March, 1925, filed suit in

the United States District Court for the Northern District of Ohio, Western Division, to restrain the withdrawal of the water from the canal by the City of Toledo until the city shall have paid it its fair compensation for the loss of the water which it is entitled to receive in the event the city deprived it of the use of water, in accordance with the provisions of said Act. The District Court denied the injunction but upon appeal to the United States Circuit Court of Appeals the city was enjoined from withdrawing the water from the canal until it shall first pay the appellee a fair compensation for the loss of the water *to which it is entitled* under its leases.

> Maumee Valley Electric Co. vs. City of Toledo, 13 F. (2d) 98 (writ of certiorari denied October 25, 1926).

On May 11, 1927, the General Assembly of Ohio enacted Section 14178-14178-12, inclusive, which provides for the abandonment of the canal from the Maumee River side-cut southwesterly the full width to the point where the canal joins the Maumee River; that all existing leases of the state shall become null and void within sixty days from the taking effect of the Act; authorizes the Commissioners of Lucas County, also the legislative bodies of the Villages of Waterville and Maumee, apellants herein, to remove all existing bridges crossing said abandoned portion of said canal; and authorizes the Director of Highways of the state, appellant Kirk, and the Commissioners of Lucas County, appellants Davis, Farnsworth and Hoffman, to drain the water from the abandoned portion of the canal and to prevent the water

from the river from flowing into and through said abandoned part of the canal.

In view of the provisions of the foregoing Act, if the same are valid, no water can flow from the Maumee River northerly into the abandoned portion of the canal nor into the portion of the canal purchased by the City of Toledo; in such event no water can reach any of the points covered by any leases of appellee, and lessee is not entitled to receive any water by virtue of said leases. Therefore City of Toledo would not be liable for compensation by virtue of the Act of January 22, 1920, 108 Ohio Laws, Part 2, 1138 to 1140, *supra*.

The City of Toledo on July 29, 1927, brought an action, Cause No. 107176, against the appellee in the Court of Common Pleas of Lucas County, Ohio, in which by virtue of the Act of January 22, 1920, it requested the court to determine the amount of compensation to appellee for its water privileges.

Appellee on August 10, 1927, brought a suit, Cause No. 107306, in the Court of Common Pleas of Lucas County, Ohio, to restrain the City of Toledo from proceeding with said Cause No. 107176 to fix compensation on the ground, among other things, that the city, in its petition in Case No. 107176, failed to allege or describe the rights of the appellee so sought to be appropriated. The judgment of the Court of Common Pleas of Lucas County, Ohio, in said cause enjoined the City of Toledo from proceeding with said action to assess the amount of compensation to the appellee on the ground that said petition in said Cause No. 107306 failed to describe the rights of appellee which appellants sought to appropriate and have valued for the purpose of fixing compen-

sation within the provision of the Act of January 22, 1920, 108 Ohio Laws, Part 2, pages 1138 to 1141, inclusive, which judgment provided that the city should have the right to file an amended petition in Cause Number 107176 showing the rights of appellee which it sought to appropriate and to have determined the amount of compensation.

But the City of Toledo was unable to set forth in said Cause No. 107176 what rights appellee had by virtue of its leases with the State of Ohio in view of the provisions of the Act of May, 1927, Section 14178 *et seq.* of the General Code of Ohio, which, if valid, declare void the leases of appellee, from which it necessarily follows, as has been shown, that no water will flow through the canal to the points covered by the leases of appellee and that appellee has no rights of any value.

On November 2, 1926, by a vote of the electors of the City of Toledo a bond issue of $800,000.00 was authorized for the purpose of paying the cost of such boulevard, but the city cannot proceed with said improvement until there has first been determined what rights the appellee has pursuant to its various leases and the value of such rights.

That the City of Toledo is rapidly growing in a southwesterly direction; that the Villages of Maumee and Waterville, suburbs of Toledo, lie southwesterly from Toledo and are rapidly growing communities; that there is only one main highway (Broadway extended into River Road) leading from the central portion of the City of Toledo southwesterly toward the Villages of Maumee and Waterville and extending from the central portion

of the City of Toledo to the southerly and southwesterly portions thereof; that the increased amount of traffic, due to the use of motor vehicles, creates congestion upon said highway; that at about three miles from the central portion of the city the tracks of the Wabash Railroad Company cross said highway at grade creating further congestion; that the city intends to eliminate said grade crossing, but has no other thoroughfare available to divert traffic during the course of such grade elimination construction.

That appellants, the State of Ohio and the Commissioners of Lucas County, intend to construct a highway upon the portion of the canal abandoned by the Act of May, 1927, Sections 14178 *et seq.*, and that they are unable to proceed with the construction of such highway until the controversies involved in the issues of the case at bar are determined; that such highway will be important as it is contemplated that it will proceed in a southwesterly direction through the municipalities of Napoleon and Defiance and from there along the Miami and Erie Canal through various municipalities to a southerly terminal in the City of Cincinnati.

Section 949 of the Revised Statutes of the United States provides:

> "When a state is a party, * * * in any suit in a court of the United States, such state * * * shall be entitled, on showing sufficient reason, to have the cause heard any time after it is docketed, in preference to any civil cause pending in such court between private parties."

It is manifest that the State of Ohio is the real party to this cause even though Harry J. Kirk, as superinten-

dent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, is the appellant, for the State of Ohio is *ex cathedra* through such officer enjoined from carrying out the provisions of the aforesaid Act of the General Assembly. That this is in effect a suit against the state is shown by a recent decision of this court in the case of *State Highway Commission of Wyoming vs. Utah Construction Company*, decided January 2, 1929, and found in the Advance Sheets of the Official Reports of this court including decisions from December 11, 1928, to January 2, 1929, in which the first headnote is:

> "Suit against the State Highway Commission and its members on a road construction contract executed in the name and on behalf of the state, held in effect a suit against the state."

As is readily seen from the foregoing statement, the State of Ohio, if the contention of appellants is correct, is needlessly required to supply water to the abandoned portion of the Miami & Erie Canal, which necessarily works an unwarranted inconvenience and expense, together with a responsibility, upon the State of Ohio.

Brief of appellants is in course of preparation and subject to completion of the printed record it is confidently hoped by counsel that it will be filed before the submission of this motion.

CONCLUSION

According to the information of counsel, if this cause is not advanced the same will not be reached for argument until October of 1929. We therefore, in con-

clusion, desire to urge the court to assign this cause for hearing prior to the summer recess of the court.

Respectfully submitted,

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BRIEF ON BEHALF OF APPELLANTS

STATEMENT OF THE CASE

This cause comes here by direct appeal from a final order and judgment of the District Court of the United States for the Southern District of Ohio, Eastern Division, whereby the provisons of Section 14178-14178-12,

All italics ours unless otherwise noted.

inclusive, of the General Code of Ohio, insofar as they provide for the draining of the water from a side-cut in the Village of Maumee southwesterly to the point where the canal joins the Maumee River, and insofar as said sections of the General Code declares certain leases owned by appellee to be null and void, are repugnant to and in contravention of the constitution of the United States, and enjoin the appellant Kirk, an officer of the State of Ohio, from performing the duties imposed upon him by the laws of said state. The judgment and order of injunction was granted by three judges sitting in pursuance of the requirements of Section 266 of the Judicial Code, pursuant to which section this appeal was taken.

The Miami and Erie Canal as originally constructed extended from the City of Toledo southwesterly through the Villages of Maumee and Waterville to a point where the same enters the Maumee River. (Map Exhibit 25, Rec. 168, side folio 183.) There is a side-cut in the Village of Maumee. We will refer to the part of the canal from the side-cut north as "Lineal Part One," and the part from the Maumee River side-cut south to the point where the same connects with the Maumee River as "Lineal Part Two."

The appellee owns a hydro-electric plant in the Village of Maumee about 1.6 miles northerly from the Maumee River side-cut located on Lineal Part One of the canal. For the purpose of supplying water for this hydro-electric plant, the appellee has acquired, by assignment, leases from the Board of Public Works of the State of Ohio to various lessees, as follows:

Robert J. Law lease, executed March 12, 1895, for a term of thirty years, covering the use of sur-

plus water at the site of the aforesaid hydro-electric plant (Exhibit 1, Rec. 68).

Studer lease, executed November 13, 1906, for a term of thirty years, covering the use of water for hydraulic power at Waterville (Exhibit 3, Rec. 77).

Tryon lease, executed April 8, 1903, for a term of thirty years, covering the use of surplus water at Maumee in the vicinity of the side-cut (Exhibit 4, Rec. 82).

Maumee Paper Company lease, executed April 8, 1903, for a term of thirty years, covering the use of surplus water at Maumee (Exhibit 5, Rec. 88).

Detwiler lease, executed February 20, 1901, for a term of thirty years, covering the use of surplus water at Maumee (Exhibit 6, Rec. 95).

In the aforesaid Tryon and Maumee Paper Company leases there is a specific provision that the water used "will at all times return into the canal after being used for hydraulic purposes." (Rec. 84, 85, 90, 91.)

The Purdy lease (Exhibit 7, Rec. 101) authorizing the taking of the water from the canal in perpetuity, was executed December 8, 1845, pursuant to the authority of resolution passed by the General Assembly March 12, 1845, 43 Ohio Laws 453. Said resolution authorized the Board of Public Works to purchase from Purdy the right to which he was entitled as a riparian owner to water flowing into the Maumee River at Grand Rapids, which the state desired, and to pay the same in surplus water. Purdy was required to execute a conveyance in fee of his estate and he received in return therefor the agreement of the state to create a dam and to sell him water to be agreed upon pursuant to a lease free from rent, which

lease was required to be in the usual form of a lease used by the Board of Public Works.

Each of the foregoing leases, except the Purdy lease, contained a provision for the payment of annual rentals to the State of Ohio, and provided for the termination of the annual rental upon failure of the state to furnish the water provided for therein. The above mentioned leases contained options for renewal thereof for a like term of years for an annual rental as might be offered by the highest responsible bidder, which bidder should also agree to purchase from the lessee all the permanent and valuable buildings necessarily erected by the lessee for the convenient use of the water power thereby leased as such buildings should be adjudged to be worth by three freeholders to be chosen as therein specified; that if no bid should be made on the terms therein mentioned, at a higher rental than specified in such lease, the lessee should be entitled to renewal of the terms of the lease.

The aforesaid leases were executed by the Commissioners of Public Works of the State of Ohio pursuant to the provisions of the Act of the legislature, 38 Ohio Laws 87, Sections 20, 21, 22, and 23 (for copy see Appendix, pages 69, 70, Sections 14009-14013, inclusive, of the General Code of Ohio, 1910 Edition), which provide in substance that whenever in the opinion of the board of public works there shall be surplus water in the canals, over and above the quantity of water which may be required for the purpose of navigation, the commissioner of public works may order such surplus water and lands of the state for the purpose of using the same, as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and

reservations as they may consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rental, or otherwise, as they might deem beneficial for the interests of the state; that no hydraulic power or right to use any water should be sold, leased or conveyed, except such as accrued from *surplus water of the canal* or from water passing around any lock, and that every such lease, grant or conveyance of water power should "*contain a reservation and condition, that the state or its authorized agents, may, at any time, resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders or streams, from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns.*"

This Act continued in effect from 1840 until it was amended in 107 Ohio Laws 418, passed March 21, 1917, which amendment only changed said Act so as to limit the term of years under any lease to twenty-five years (Appendix page 71, Section 14009, Ohio General Code).

The appellee in the year 1900 acquired the above mentioned Law lease (Exhibit 1) which is the principal lease except for the Law supplemental lease (Rec. 60, par.

4), and thereupon constructed a hydro-electric plant. (Bill of Complaint, page 8.) The Purdy lease was acquired by appellee April 27, 1910 (Rec. 60, par. 4.)

On December 10, 1910, a lease was executed, known as "Law Supplemental Lease" (Exhibit 2, Rec. 74), to Law, as lessee, which provides that during the remainder of the term of the Law lease (Exhibit 1): First, the state should let into the eighteen-mile level of said canal at Grand Rapids, from the pool above, waters of the Maumee River equal to the safe capacity of said canal for use for hydraulic purposes at the mill of the appellee located near Maumee, and to cause as large, steady and even flow of such waters as may be practicable except in cases of unavoidable accident or public safety, all consistent with the rights of navigation upon said canal; and second, that the state should require the superintendent of canals to appoint three patrolmen who should be paid for their services by appellee and who should be required to patrol said canal banks between Grand Rapids and Lock No. 45, to repair breaks in the canal banks, stop leaks, remove logs, brush and other impediments; and third, that the state

> "does sell and lease unto the Company, all of the increased water passing over the weir of said Company provided for by this agreement"; and

fourth, that the company (appellee) agreed to maintain its weir at all times at the level at which the same is constructed or on the order of the board of public works, at such level as said board may hereinafter require; and fifth, the company (appellee) agreed to complete the excavation of the rock bars in the canal near Waterville as well as remove all other obstructions on the eighteen-mile level and to raise the banks thereof with all pos-

sible diligence at its own proper expense; and sixth, the company (appellee) agreed to pay the compensation of the three patrolmen to be appointed by the state at a daily wage of not less than One and 25/100 Dollars ($1.25); and seventh, the company (appellee) further agreed to pay the State of Ohio the sum of Fifteen Hundred Dollars ($1500.00) per year in addition to the Five Hundred Dollars ($500.00) provided for in the Law lease and to pay an additional Fifteen Hundred Dollars ($1500.00), making Thirty-five Hundred Dollars ($3500.00) in all, in case the amount of water specified in the seventh section should be furnished; and eighth, all payments except premium payments for uninterrupted service are to be made subject to all the provisions specified in the Law lease; and ninth, this agreement was to continue until the 12th day of March, 1925, unless sooner terminated by default on the part of the company, and it is provided that:

> "A cancellation of said lease of March 12, 1895, for any cause whatsoever, shall work a cancellation of all the obligations on this supplementary agreement."

It will be observed that the Law supplemental lease has expired and that there is no provision in this lease or agreement for a renewal thereof. It is the contention of appellants that the rights of appellee thereunder have terminated.

On August 7, 1924, prior to the expiration of the thirty-year term in the Law lease (Exhibit 1), the Studer lease (Exhibit 3), the Tryon lease (Exhibit 4), the Maumee Paper Company lease (Exhibit 5) and the Detwiler lease (Exhibit 6), the appellee filed (Exhibit 19, Rec. 140)

with the board of public works of the State of Ohio as an election to renew the aforesaid leases, and likewise attempted to renew the provisions of the Law supplemental lease (Exhibit 2). The board of public works, however, did not execute renewal leases in accordance with the election (Stip. 9, Rec. 62). To give effect to the claims of the appellee as to the Law lease and Law supplemental lease requires the assumption that its election for a renewal was valid and that the various terms and provisions in connection therewith had been complied with, and that such renewal had in fact been granted. (Note terms of this request, which asks for a renewal of the Law supplemental lease (Exhibit 2), to which appellee was not entitled.) Neither did said appellee make any further effort to procure the execution of renewals of said leases in accordance with the terms of the renewal provisions therein contained and the statutes of the State of Ohio, for if the contention of appellee as to the terms of said Law lease (Exhibit 1) and Law supplemental lease (Exhibit 2) is correct, then the terms of a new lease would have contained a provision giving appellee an option to renew the same for a period of thirty years, and thus, if the state would be required to embody a renewal option in the renewal lease, the state would, at the option of appellee, or its assigns, in perpetuity, be required to maintain the canal to the detriment of the public for the use and benefit of appellee, or its assigns.

On May 11, 1927, the legislature of the State of Ohio, over the objection of the governor, enacted Sections 14178-14178-12, inclusive, of the General Code of Ohio, 112 Ohio Laws, 360-363 (Appendix pages 73 to 78), which provide that the Miami and Erie Canal in Lucas County

from a point below the head of the Maumee River side-cut southerly to the point where the canal joins the Maumee River on the westerly side (Lineal Part Number Two) thereof be abandoned for canal and hydraulic purposes; that the State of Ohio reserves the title to the canal lands in fee simple; that all existing leases for canal or hydraulic power purposes on the portion of the canal so abandoned become null and void on and after sixty days from the taking effect of said Act; that the state highway director, within sixty days from the taking effect of the Act, should drain the water from the abandoned portion of the canal and prevent the water of the Maumee River from flowing into or through the abandoned portion thereof; that said abandoned portion of the canal should be under the supervision and control of the state highway director and should be devoted to highway and park uses and purposes; that the director of highways should cause surveys thereof to be made, together with maps and plats thereof; that no portion thereof should be leased for any purpose, but that until the State of Ohio should construct and improve the same for a highway, municipal corporations through which such highway should pass when completed and the commissioners of Lucas County should be permitted to use said canal lands for public purposes only without compensation; the Act also authorized the commissioners of Lucas County, the council or other legislative body of municipalities or townships through which such portion of the canal passed, the right to remove bridges crossing the abandoned portion thereof, and to grade and construct roads and streets across the channel of the abandoned portion thereof by necessary fills or grades, and author-

ized and directed the county commissioners of Lucas County to authorize the draining of the water from said abandoned portion and to prevent the water from flowing into or through said abandoned portion of the canal; and likewise made provision for leasing lands not necessary for highway purposes. This Act became effective as a law on August 10, 1927, in view of the referendum provisions of Article II, Section 1, of the Constitution of Ohio.

The bill of complaint (Rec. 1) alleges appellee's claim to the right to use hydraulic power by virtue of the leases and agreements (Exhibits 1-7, inclusive) and the application of appellee for renewal (Exhibit 19, Rec. 140), and further alleges that the director of highways of the State of Ohio is, in pursuance of the Act of May 11, 1927, intending to drain the water from the abandoned portion of the canal (Lineal Part Two), and that the draining of the water from the canal will be a taking of its property without compensation and without due process of law, in violation of the Federal Constitution, especially the Fourteenth Amendment, and also claims that said Act of May 11, 1927, impaired the obligations of a contract between the State of Ohio and City of Toledo which it claims was made for its benefit, and said agreements of lease for hydraulic power.

The circumstances under which the appellee claims that there was a contract between the State of Ohio and the City of Toledo for its benefit arose out of the purchase by the City of Toledo of the portion of the canal from the Maumee River side-cut northerly (Lineal Part One) by deed of December 29, 1922 (Exhibit 15, Rec. 133), authorized by an Act of the General Assembly

passed January 22, 1920, 108 Ohio Laws, Part 2, pages 1138 *et seq.*, which deed conveyed to the City of Toledo the canal from the Maumee River side-cut to the northerly portion thereof, excepting therefrom and subject to the rights of owners of existing leases of lands or water, or both, and excepting therefrom the rights of said owners to a renewal of existing leases. The Act of January 22, 1920, provided for the abandonment for canal and hydraulic purposes of the portion of the canal (Lineal Part One), authorized a survey and an appraisal of the lands to be made, and granted to the City of Toledo an option to lease or purchase said lands. Said Act (Section 6) provided that if the City of Toledo should signify its intention to purchase said property, the governor was authorized, as soon as the purchase price had been paid into the state treasury, to execute a deed conveying the same in fee simple to the City of Toledo, excepting therefrom and subject to the rights of owners of existing leases of either lands or water, or both, and the rights of said owners to a renewal of existing leases; and further provided that in case the amount of compensation could not mutually be agreed upon, the City of Toledo should have the right, under the provisions of the General Code, to condemn the rights of such lessees for the use of the municipality, *and further provided that the Act should not be construed as granting to the lessees any rights in addition to those granted to them in their existing leases.* (For Sections 6 and 7 see Appendix page 72.)

The evidence is presented by an agreed statement of facts, (Rec. 57-69 inclusive) together with exhibits thereto attached (Rec. 68-169 inc.)

The answers (Rec. 29 to 50, inc.) of appellants in effect denied that the Act of May 11, 1927, would violate the guaranty of the Constitution of the United States.

This cause came on for hearing before the Honorable Maurice H. Donahue, United States Circuit Judge of the Sixth Circuit; the Honorable Benson W. Hough, and the Honorable Smith Hickenlooper, United States Diistrict Judges for the Southern District of Ohio, in view of Section 266 of the Judicial Code, requiring three judges, one of whom shall be a Circuit Judge, to authorize an injunction to restrain the enforcement, operation or execution of a state statute by restraining the action of an officer of the state. The court held in favor of the appellee and found (Rec. 185) that the provisions of the Act of May 11, 1927, 112 Ohio Laws 360-362, insofar as it declared or attempted to declare the leases, agreements and grants from the State of Ohio for water to be taken from that portion of the canal described in the Act (Lineal Part Two) to be null and void, and insofar as it directed the state highway director to drain the water out of said portion of said canal and to prevent the waters of the Maumee River from flowing into said canal, and granted to appellants permission to fill said canal and obstruct the flow of the water therein, were contrary to and in contravention of the Constitution of the United States, and therefore null and void and of no effect with respect to and as affecting or intending to affect leases, agreements and grants of the appellee referred to in the bill of complaint and in the record (Rec. 186), and enjoined (Rec. 187) the appellant Kirk, as Director of Highways of the State of Ohio, and each of the other appellants and his or their respective succes-

sors, and their various officers, agents, associates, appointees and employees and their respective successors, during the existence of the leases, agreements and grants of appellee (a) from draining or causing to be drained from the portion of the canal described in said Act of May 11, 1927 (Lineal Part Two), which, except for such draining would be available to appellee for its use, to the amount provided for and called for in said leases and agreements; namely, the Law lease (Exhibit 1), the Law supplemental lease (Exhibit 2), the Studer lease (exhibit 3), the Tryon lease (Exhibit 4), the Maumee Paper Company lease (Exhibit 5), the Detwiler lease (Exhibit 6), and the Purdy quit-claim grant (Exhibit 7); and (b) from doing or causing to be done any act, matter or thing in any way, or by any means, with respect to the Maumee River which would prevent or in anywise interfere with or obstruct the flow into or throughout or northeasterly beyond said portion of the canal above described (Lineal Part Two)—(meaning thereby to Lineal Part One) which, except for such prevention, obstruction, or interference would and will be available to the appellee for its use to the amount provided for and called for in the leases, agreements and grants of appellee.

HISTORY OF THE MIAMI AND ERIE CANAL

The matter of constructing a canal in Ohio it seems first appears in an inaugural address of Governor Brown, delivered on December 14, 1818, in which he said in substance that to raise the character of our state by increasing industry and our resources, it was necessary to improve the internal communications, and open a cheaper

way to market for the surplus produce of a large portion of our fertile country. ("History of the Ohio Canals," by Kilbourn, page 3.)

On January 7, 1819, a resolution was introduced in the House of Representatives of the State of Ohio, which provided for the appointment of a committee of five members of the house and ..... members of the senate to take into consideration the subject of internal improvements as related to the construction of a canal connecting the waters that flow into Lake Erie with those that flow into the Ohio River. ("History of the Ohio Canals," by Kilbourn, page 3.)

The following day Governor Brown sent a message to the legislative body, in which he said:

> "You will bear in mind, that our productions which form our only great resource, are generally of that bulky and ponderous description, as to need every easement in conveyance, that we can afford. Experience is a faithful monitor; and the millions expended for transportation during the late war, may teach an useful lesson; • • • Roads and canals are veins and arteries to the body politic, that diffuse supplies, health, vigor and animation to the whole system; • • • ." ("History of the Ohio Canals," by Kilbourn, page 3.)

On February 23, 1820, the General Assembly of Ohio enacted a law, in which it recited:

> "Whereas, the effecting a navigable communication, by means of a canal or canals, between Lake Erie and the Ohio River, would greatly promote the agricultural, manufacturing and commercial interests of a number of our sister states, of the union generally and of this state particularly." • • •

Therefore, it was enacted that three commissioners be appointed for locating a route for a canal between Lake Erie and the Ohio River, 18 Ohio Laws 147. ("History of the Ohio Canals," by Kilbourn, pages 12 and 13.)

On January 3, 1823, the canal commissioners made their first report. In this report reference is made to the advantage of canal navigation over other modes of transportation. It is said in part:

> "The advantages of canal navigation over any other mode of conveyance, are now so generally known, and so justly estimated that a minute analysis (of) them is not deemed necessary. The fertility of our soil promises to secure to the labors of agriculture an abundance, very far beyond any probable consumption in our own territory.
>
> "The amount of tonnage which this surplus may furnish for the employment of a canal navigation cannot be estimated by the commissioners. * * *
>
> "But the products of agricultural labor will not be the only articles of bulk and value, the transportation of which to distant markets will be opened by a canal navigation. Among various other articles which may be mentioned, the gypsum of Sandusky, [illegible] the fisheries of the upper lakes are inexhaustible sources of supply to the interior of the state, and the vast region of the south, of an article of great value to agriculture, and the arts; and an article at present of costly diet, owing to the expense of land transportation from the Atlantic cities.
>
> "The mineral coal of Ohio, is another material at present of value only in its immediate neighborhood; which by a canal navigation would become an important and very valuable article of exportation. * * *
>
> "In estimating the value of our surplus productions, it must not be forgotten that every saving in the expense and labor of transportation to market directly, increases that value and as directly also,

> increases the value of our lands. * * * That on a canal, one horse will transport as much as will require the labor of 30 horses upon land; * * *." ("History of the Ohio Canals," by Kilbourn, pages 37 and 38.)

Nowhere does this report make any reference to the use of the canal for hydraulic power.

The first suggestion of the use of the canal for water power is found in a report of the canal commissioners under date of January 3, 1825, when for the first time there was a recognition that there was a possibility of utilizing water power. The report shows that in three years from the commencement of the work, an extensive and valuable water power at the southern termination of the canal in Cincinnati would be at the disposal of the state, the amount of water which might be taken from the canal, and the possible income therefrom. ("History of the Ohio Canals," by Kilbourn, page 141.) It will be noticed that in the report reference is made to the water so to be used as "surplus water."

On February 4, 1825, the General Assembly of Ohio, by an Act found in 23 Ohio Laws 50, provided for the appointment of a Board of Canal Commissioners, authorized and empowered the canal commissioners to construct a navigable canal on various routes in the State of Ohio, including the Miami and Erie Canal from Cincinnati to the Maumee River, the expenses thereof to be paid out of the funds of the State of Ohio. These commissioners were authorized to establish reasonable tolls and deputy marshals for the collection and payment thereof, and to take and use waters and streams of the State of Ohio, but no provision was made therein for the leasing of hydraulic power.

By an Act of Congress passed May 24, 1828, Volume 4, United States Statutes at Large 305, it was provided that lands granted to the State of Ohio be subject to the disposal of the legislature and

> "Provided, That said canal, when completed, shall be, and forever remain, a public highway, for the use of the government of the United States, free from any toll or other charge, whatever, for any property of the United States, or persons in their service, passing through the same: * * *"

It was further provided in said Act that the State of Indiana be authorized to convey and relinquish to the State of Ohio, upon terms to be agreed upon, the right and interest granted to the State of Indiana to lands within the State of Ohio by an Act approved March 2, 1827, which authorized the granting of certain quantities of land for the purpose of aiding the State of Indiana in opening a canal to connect the waters of the Wabash River with those of Lake Erie.

(Surely it could not have been the purpose of the State of Indiana to connect the waters of the Wabash River with those of Lake Erie for the purpose of providing hydraulic power for citizens of the State of Ohio. Thus it is apparent that the purpose of the canal was for navigation, and that the use of water power came up as an incidental purpose.)

The first legislation directly authorizing the board of public works to sell or lease the right to the use of surplus water was enacted on February 18, 1830, 28 Ohio Laws 58, which was superseded by the Act of March 23, 1840, 38 Ohio Laws, page 87 (Sections 20, 21, 22, 23 are shown in Appendix pp. 69 and 70). This last Act authorized the board of public works to sell or lease the right

to use surplus water for hydraulic or other purposes whenever there should in the opinion of the board of public works be any surplus water. Such right, however, was by said Act, subject to the rights of the state for navigation purposes, and that no water should be used or taken by the lessee or vendee if necessary for the purpose of navigation.

The Act further provided that every such lease, grant or conveyance of *water power* should contain a reservation or condition that the state, or its authorized agents, might resume the right or privilege to the use of the water, or any portion thereof, whenever it was deemed necessary for the purposes of navigation or whenever its use for hydraulic purposes should be found to interfere with and injuriously affect navigation, and whenever such privileges should be resumed in whole or in part, the sum paid therefor or rent reserved or the reasonable portion thereof should be determined upon agreeably to the stipulations or agreements of the deed of conveyance and be refunded or remitted to the purchaser or lessee.

This Act continued in effect until amended by the Act of March 21, 1917, 107 Ohio Laws 418, Section 14069, Volume 3 of Page's Annotated Ohio General Code (appendix pp. 70, 71). The amendment to the Constitution of Ohio had transferred to the superintendent of public works the duty formerly imposed upon the board of public works. The amendment of March 21, 1917, carried this into effect and reduced the term of the water leases to twenty-five years.

In the case of *State ex rel. vs. Railway Company*, 37 O. S. 157, it was held that the object of the state in constructing the canal was to effect a navigable com-

munication between Lake Erie and the Ohio River in order to promote the agricultural, manufacturing and commercial interest of a number of our sister states of the Union generally and of this state particularly, in effect the language of the law enacted by the General Assembly on February 23, 1820.

Fox vs. Cincinnati, 104 U. S. 783; 33 O. S. 492.

Walsh vs. Railroad Company, 176 U. S. 469, 477; 58 O. S. 123.

SUMMARY OF ARGUMENT

Appellants contend:

I. That the governmental and principal purposes for the establishment of the canal were for transportation; that the use of surplus water for hydraulic power by various lessees of the State of Ohio was an incidental purpose and therefore the State of Ohio had a right to terminate the use of the canal for navigation purposes at such time as it chose, and upon its determination to abandon the canal for navigation purposes the rights of lessees to use the surplus water of the canal for hydraulic purposes, being incidental to the main purpose, thereby ceased, without compensation to such lessees on account of any loss resulting therefrom.

II. That the Act of 1840, Section 38 Ohio Laws 87, Swan's Statutes of Ohio, 1841, pages 174-200, pursuant to which leases of the appellee were executed, correctly interpreted, give the state the right to abandon any portion of the canal at any time, and thereby terminate all rights under leases for hydraulic power, subject only to

the right of such lessees to receive back from the state such proportion of the rentals which the lessees may have paid in advance as the unexpired part of the term of the lease bears to the rent paid.

III. That the legislature of the State of Ohio had a right to abandon the canal for navigation purposes, and, having abandoned the canal for navigation purposes, the rights of appellants, Villages of Maumee and Waterville, required that the water from the Maumee River follow its natural course, and that the failure of the state to return the water to the natural course of the Maumee River, depriving said villages of the free and uninterrupted flow of the water into the natural channels, is unlawful.

IV. The leases of the appellee were executed after the Supreme Court of the State of Ohio, as well as the Supreme Court of the United States had determined that in view of the provisions of leases executed by the board of public works pursuant to the Act of 1840, 38 Ohio Laws 87, the use of the water for hydraulic purposes was but an incident to the principal object for which the canal was built; that when the canal was no longer needed for its principal object, namely, navigation, the state had a right to abandon the same without creating any liability to continue to supply water for hydraulic purposes, and that every lessee of hydraulic power took his lease and made his improvements with full knowledge of the reserved right of the state to discontinue the canal and to stop the supply of water, and therefore the appellee and its predecessors in title took whatever rights were granted to them by their respective leases subject to the construction of the terms and conditions thereof as pro-

nounced by the Supreme Court of Ohio and the Supreme Court of the United States, that changes in the circumstances because of the change in and development of methods of transportation, and changes in the economic conditions of the country would not and cannot enlarge the subject matter of these leases, so as to extend to the lessees rights which were greater than those granted at the time of the original leases; that no expansion or extension of such rights can be made by a change of circumstances, but that action on the part of the state by executing additional leases or grants would be required in order to convey to the lessees rights enlarging those originally granted to them.

V. That the legislature of the State of Ohio has the power to declare the public policy of the state and as such has the power from time to time to change the public policy of the state, and that no legislature can forever settle such public policy, nor foreclose a subsequent legislature from changing such public policy.

VI. To give effect to the claims of appellee would result in requiring the State of Ohio to devote public property to private use. This would be in violation on the part of the state of its duties to the public.

VII. That the State of Ohio did not and could not abandon the canal for navigation purposes by lack of use, but that such abandonment was only by act of the legislature expressly so declaring; that no such abandonment of the canal was effective as to Lineal Part Two until the Act of May 11, 1927, 112 Ohio Laws 360-363.

VIII. That the agreement between the State of Ohio and the City of Toledo, resulting from the deed from the State of Ohio to the City of Toledo (Exhibit 15), and

the provisions of the Act of the General Assembly, 108 Ohio Laws, Part 2, page 1138, created no obligation on the part of the State of Ohio to continue the canal.

IX. That any rights owned by the appellee under the Purdy lease relate to water taken from the canal on the southerly side of the Maumee River, whereas the portion of the canal abandoned by the Act of May 11, 1927, (Lineal Part Two), is on the northerly side of the Maumee River, so that the waters, if any, which the appellee claims it is entitled to receive under this lease, if appellee's construction thereof is correct, would not be interfered with by the abandonment of the canal; therefore any claim of appellee as to the Purdy lease is a moot question.

X. That the District Court erred in holding that the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company*, 114 O. S. 437, changed the rule established by its earlier decisions in the case of *Hubbard vs. Toledo*, 21 O. S. 379, and other kindred cases.

XI. That the decision of the United States Circuit Court of Appeals for the Sixth Circuit, in the case of *Maumee Valley Electric Company vs. City of Toledo*, found in 13 Fed. (2d) 98, interpreting the rights between the appellee and the City of Toledo (a) did not hold that appellee had any rights against the State of Ohio resulting from the deed from the State of Ohio to the City of Toledo (Exhibit 15); (b) that the decision and judgment of the Circuit Court of Appeals in said cause did not and could not bind the State of Ohio because the state was not, either directly or through any of its officers, a party thereto.

SPECIFICATION OF ERRORS

1. The District Court erred in decreeing that the Act of the General Assembly of Ohio passed on May 11, 1927, 112 Ohio Laws, 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, to be in contravention of and contrary to the Constitution of the United States so as to deprive the appellee of rights without due process of law, and in decreeing that said Section impairs the obligation of agreements and leases between the appellee and the State of Ohio.

2. The decree of the District Court is contrary to the decisions of the Supreme Court of Ohio and of this court.

ARGUMENT

I

The principal object for which the canal was built was navigation. The use of water for hydraulic power was an incidental purpose. When the canal is no longer needed for its principal object, namely, navigation, it may be abandoned without creating any liability on the part of the state to continue to supply water for hydraulic purposes. Every lessee of hydraulic power took his lease and made his improvements will full knowledge of the reserved right of the state to discontinue the canal and to stop the supply of water without compensation for any loss which any lessee might thereby sustain.

Fox vs. Cincinnati, 104 U. S. 783. Affirming
Fox vs. Cincinnati, 33 O. S. 492.
Hubbard vs. Toledo, 21 O. S. 379.

Elevator Company vs. Cincinnati, 30 O. S. 629.

State vs. Board of Public Works, 42 O. S. 607.

Voight vs. Railroad Company, 58 O. S. 123. Affirmed under name of Walsh vs. Railroad Company, 176 U. S. 469.

The question thus presented first arose in the case of *Hubbard vs. Toledo, supra,* in which the Honorable Morrison R. Waite, afterwards Chief Justice of the United States, was one of the attorneys for the plaintiff, Hubbard, the owner of a lease from the State of Ohio of hydraulic power located on the Miami and Erie Canal in the City of Toledo. That portion of the canal was abandoned without making any provision for compensating Hubbard on account of the use of water prior to the expiration of the term of his lease. The Supreme Court of Ohio held that the leases or agreements for the use of hydraulic power, in view of the terms and conditions of the Act of March 23, 1840, under which the same were authorized, must be interpreted to give to the state the right to abandon the canal for navigation purposes at such times as it might deem proper, withdraw the water from the canal, destroy the rights of the holders of water leases without liability for compensation to such holders; that the governmental power of the state authorizes the taking of water from natural water courses and diverting them to a canal for the purpose of navigation; that the purpose of the construction of the canal was to create a system of transportation by water, and that the leasing of water rights was simply incidental to the main pur-

pose. We quote from the syllabus of the Supreme Court of Ohio in that case:

> "2. The obstruction of a navigable stream cannot be maintained to promote private interests. Hence, when the state abandoned the Manhattan Branch Cana. the aqueduct, a part thereof, spanning and obstructing Swan Creek, which is a navigable stream, became a common nuisance, to abate which any riparian proprietor injured thereby had the legal right to invoke judicial proceedings.
>
> • • •
>
> "4. The abandonment of her public canals by the state, creates no liability on her part to respond in damages resulting therefrom to parties holding leases of 'surplus water,' under the Act of March 23, 1840, 'to provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and the collection of tolls'."

This question was again before the Supreme Court of Ohio in the case of *Elevator Company vs. Cincinnati, supra.* Afterwards litigation arose between Fox and the City of Cincinnati, in which the Supreme Court of Ohio for the third time affirmed the principles hereinbefore referred to. The case proceeded by writ of error to this court and Chief Justice Waite for this court rendered the opinion affirming the decision of the Supreme Court of Ohio, citing with approval the case of *Hubbard vs. Toledo, supra,* and *Elevator Company vs. Cincinnati, supra;* on page 785 it is said:

> "• • • and it never could have been intended in this way to impose on the state an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the state to maintain the canal for navi-

> gation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether. Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability. Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the state to discontinue its canal and stop his supply of water."

As to the opinion of this court in *Fox vs. Cincinnati, supra*, and as to the case of *Elevator Co. vs. Cincinnati, supra*, this court in the case of *Kaukauna Co. vs. Green Bay, etc., Canal*, 142 U. S. 255, opinion by Mr. Justice Brown, said:

> "In the *Little Miami Elevator Company vs. Cincinnati*, 30 O. S. 629, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation; but it was held that such use was a subordinate one, and that the right to the same might be terminated whenever the state, in the exercise of its discretion, abandoned or relinquished the public use. * * * 'By so doing,' said the court, 'the water power would cease to be an incident to the public use, and the state would be engaged in the private enterprise of keeping

> up and renting water power after it ceased to act as a government in keeping up the public use.' The same ruling was made by this court in *Fox vs. Cincinnati*, 104 U. S. 783."

Hubbard vs. City of Toledo, supra, was also cited.

Courts in other states considering abandonment of canals have likewise held that a canal is a public work constructed for a public purpose and that the leasing of water power is simply an incident to the canal and not the purpose of its creation; that a lessee of water power must have known the purpose for which the canal was constructed and took such leases subject to the use of the canal and of all the vicissitudes which might attend a public work of such character, namely, dilapidation, destruction or abandonment; such lessee had no legal right to suppose that the state would keep up the canal for the purpose of furnishing him water if it became inexpedient to maintain it as a public work.

Fishback vs. Woodruff, 51 Ind. 102.
Trustees vs. Brett, 25 Ind. 409.
Skellen vs. Water Works, 49 Ind. 193.
Hoagland vs. Railway Co., 111 Ind. 443; on rehearing 111 Ind. 451.
Commonwealth vs. Railroad Co., 51 Pa. State 351.
Jessup vs. Loucks, 55 Pa. State 350.

II

The Act of March 23, 1840, 38 Ohio Laws 87, until amended by the Act of March 21, 1917, provided the only authority under which the leases of appellee were exe-

cuted. These leases were made subject to the terms and provisions of said Act which provided in substance that every lease, grant or conveyance of water power should contain a reservation or condition that the state or its authorized agents might resume the privilege to the use of the water or any portion thereof whenever it is deemed necessary for the purposes of navigation or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect navigation and *whenever such privilege* (to the use of water) *shall be resumed in whole or in part*, the sum paid therefor or rent reserved or reasonable portion thereof should be determined upon agreeably to stipulations in the deed of conveyance and be refunded or remitted to the purchaser or lessee. Agreeable to this authority of the General Assembly, the leases of appellee each contained a provision that if, for the purposes, among other things, of repairing the canal or making improvements to the canal or works connected therewith, the lessee should be partially or wholly deprived of the use of any portion of the water power thereby leased so as to prevent the operation of any hydraulic works, then deduction should be made from the rent accruing on such portion of the water power as the lessee should be prevented from using as will bear the same proportion to the yearly rental thereof at the time during which said lessee had been deprived of its use bears to eleven months.

The leases under consideration in the case of *Hubbard vs. Toledo, supra*, and the other cases decided by the Supreme Court of Ohio, and also in the case of *Fox vs. Cincinnati, supra*, decided by this court, were exe-

cuted pursuant to the authority of the Act of March 23, 1840, with provisions in substance the same as the leases of appellee. These decisions of the Ohio courts and the decision of this court in *Fox vs. Cincinnati, supra,* hold that by the terms of the lease and of the statute authorizing it, the state assumed no responsibility to maintain the canals for the exclusive benefit of lessees of surplus water, and that said contracts of leases contained no express stipulation for the payment of loss to lessees in the event of abandonment of the canal; that the agreement of lease would not impress upon the state a liability by implication on account of abandonment, where no liability against the state was created on account of a resumption of water by the state within the purposes of the Act of March 23, 1840.

Upon this subject Mr. Chief Justice Waite, in the case of *Fox vs. Cincinnati, supra,* said:

> "Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability."

These leases of appellee were made during the period when the provisions of the Act of March 23, 1840, were without change in effect. If the Act of March 23, 1840, and the leases executed in pursuance thereof, at the

time of the decision of the case of *Fox vs. Cincinnati, supra,* and of the decisions by the Supreme Court of Ohio of the cases of *Hubbard vs. Toledo, Elevator Co. vs. Cincinnati* and *Voight vs. Railroad Co.* were subject to the interpretation as applied by these courts, there having been no amendment to the law, it would seem to follow that the leases and agreements subsequently made under the same authority, with the same terms and provisions, must of necessity have the same meaning.

Warburton vs. White, 176 U. S. 484.
Banks vs. DeWitt, 42 O. S. 263.
Kulp vs. Fleming, 65 O. S. 321.

III

The state takes water for the canal from the Maumee River at the southerly point of "Lineal Part Two" and carries the same northerly, thus diverting water which would, if uninterrupted, naturally flow in the channel of the Maumee River. Of course, the state had the right to divert the water from its normal flow through the channels of the Maumee River for navigation purposes. But upon abandonment of such purposes in accordance with the Act adopted May 11, 1927, the public purposes for which the state had been taking the water ceased. The rights of the appellee being solely on account of the use of water for hydraulic purposes and being a purpose incidental to the governmental purpose of navigation, the appellants who are adversely affected by the flow of the water through the canal instead of the natural channel of the Maumee River are entitled to

have the water of the Maumee River restored to its natural flow.

Cooper vs. Williams, 5 Ohio 391.
Buckingham vs. Smith, 10 Ohio 288-296 and 7.
Sweet vs. Syracuse, 129 N. Y. 316-335.
Kaukauna Co. vs. Green Bay, etc., Canal, *supra.*

The appellants, the Villages of Waterville and Maumee, are adversely affected by the diversion of the water from the Maumee River to the canal as the water now passes into the abandoned portion of the canal along an artificial channel through said villages instead of through the natural channel of the Maumee River. These appellants, as well as the state, are entitled to have the water flow freely and without interruption in the natural channels of the Maumee River in view of the abandonment by the state of the canal for navigation purposes. Appellee is therefore without equity and not entitled to the relief prayed for.

IV AND V

The leases of appellee were executed after the Supreme Court of the State of Ohio and this court construed the rights of the state under and pursuant to the Act of March 23, 1840, and leases containing in substance the exact terms and provisions of the leases of the appellee to mean that the state had the right at any time to decide so to abandon the canal for navigation purposes without liability to any lessee on account of such

abandonment and that such lessee took his lease and made his improvements with full knowledge of the rights reserved by the state to so abandon the canal without liability on account of the terms of the leases for hydraulic power. The appellee and its predecessors having so acquired its leases, made improvements and having knowledge of the construction and interpretation by this court and of the Supreme Court of Ohio of said Act of the legislature and of the provisions of said leases, cannot now complain that the abandonment by the state of the canal deprives them of any rights to which they are entitled. The question thus presented is clearly *stare decisis*.

Robb vs. Irwin, 15 Oh. 689, 703, 704.
Arrowsmith, vs. Harmoning, 42 O. S. 254.
Cincinnati vs. Taft, 63 O. S. 141, 161, 162.
Warburton vs. White, *supra*.

In the bill of complaint (Rec. 9) the appellee relies upon the provisions of Sections 14218 of the General Code, enacted April 9, 1902, 95 Ohio Laws 118, by which the legislature declared as a settled policy of the state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent land from Cincinnati to Toledo, should be retained and maintained as a public canal. Like declaration of policy was made as to the northern division of the Ohio Canal from Cleveland to Dresden on the Muskingum River. The bill of complaint copies the first section of said Act. The second section (Appendix page 72) anticipates change of public policy of the state as to the canals by providing that if the policy of the state should change

so as to abandon the canal, the state should pay to persons thereafter building boats for use on the canal the value thereof. We desire to emphasize the importance of this provision as showing the intent of the state as to the probability of changing its public policy, and likewise to emphasize the failure of the legislature to make any provision for compensation to the holders of water leases on account of loss sustained by reason of improvements subsequently made by them, in the event of the abandonment of the canal.

The public policy of the state is a variable thing. It fluctuates with circumstances of time. Public policy of the state is determined by its legislature and its courts, and whenever the interest of the public requires a change in public policy on account of varying conditions and circumstances the public policy must of necessity be changed, regardless of a declaration to the contrary by a previous legislature or by previous decisions of courts.

As said in Williston on Contracts, Vol. 3, Section 1630:

> "The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with circumstances of the time."

See also *Nordenfelt vs. Maxim Guns and Ammunition Co.*, 1894, A. C. 535; *Attorney General vs. Adelid Steamship Co.*, (1913) A. C. 781; *Horner vs. Graves*, 7 Bingham 735.

In the case of *Seattle Electric Co. vs. Power Company*, 40 Washington 380, it is said:

> "While courts of equity will not enforce contracts entered into either in violation of positive

law or a rule of public policy where the public interests of the parties thereto are alone involved, yet, when *the public interests* are involved, it will enforce such contracts as long *as such public interest requires it.*"

The legislature of the State of Ohio has consistently since 1902 and whenever the circumstances seemed to have arisen, by abandoning portions of the canal, altered the policy declared by the Act of April 9, 1902. For various acts of the legislature of Ohio, enacted since April, 1902, abandoning portions of the canal, see:

102 Ohio Laws 168 (Section 14188-1 *et seq.*, Ohio General Code) permitting the City of Cincinnati to use a portion of the canal for public streets, boulevards, sewerage, conduits and subway purposes.

103 Ohio Laws 720 (Section 14188-6 (a) *et seq.*, Ohio General Code) grants similar rights to the City of Cincinnati.

106 Ohio Laws 293 (Section 14188-6 (h), Ohio General Code) grants similar rights to the City of Cincinnati.

106 Ohio Laws 499 (Section 14176-1 *et seq.*, Ohio General Code) authorizing the sale to the City of Toledo of the portion of the canal northeasterly from that portion of the canal shown in Stipulation Exhibit No. 25, and northeasterly from the portions sold by the state to the city hereinafter referred to.

107 Ohio Laws 572 (Section 14188-9, Ohio General Code) authorizing quit-claim deed to the City of Toledo.

108 Ohio Laws, Part 2, pages 1138 (Section 14188-15 *et seq.*, Ohio General Code, pursuant to which a deed from the State of Ohio to the City of Toledo (Stipula-

tion Exhibit No. 15) was executed by the governor and delivered to the City of Toledo.

109 Ohio Laws 369, authorizing the sale of certain canal lands within the City of Toledo.

The Act of May 11, 1927, in terms repealed any Act inconsistent therewith, and therefore, insofar as Section 14218 of the General Code conflicts with the Act of May 11, 1927, the same is repealed; (Section 13 provides that all Acts or parts of Acts in conflict "with this Act be and the same are hereby repealed").

The principal lease, namely, the Law lease, was executed in 1895. The Detwiler lease was executed February, 1901. These constituted the principal leases. The Studer lease was executed in November, 1906, and calls for 2100 cubic feet of water per minute; the Tryon lease, executed in May, 1903, calls for 2050 cubic feet per minute; the Maumee Paper Company lease, executed in April, 1903, calls for 2050 cubic feet per minute, making a total number of cubic feet of water per minute to which appellee would be entitled under the leases executed after the passage of the Act of April 9, 1902, 95 Ohio Laws 118-120, to be 6200 cubic feet, or a very small quantity of water compared with the flow of water appellee now claims it is entitled to receive. It can not be claimed that the Law lease, executed March 12, 1895, which called for all of the surplus water in the canal not needed for navigation between Providence and Toledo, and the Detwiler lease which authorized the taking of 833 cubic feet per minute were executed in reliance upon any such public policy of the State of Ohio. As to the Law supplemental lease, Exhibit 2, it will be observed that in accordance with the ninth paragraph thereof the

agreement should continue until March 12, 1925, and no provision was made for extending the term beyond that time. The investment made by the appellee an account of the provisions of the Law supplemental lease, which are the only investments shown by the evidence (Rec. 161) to have been made by appellee since the enactment of the Act of April 9, 1902, must have been with the clear understanding and agreement that the Law supplemental lease, Exhibit 2, expired by its terms on March 12, 1925.

The bill of complaint further shows that the appellee in the year 1900, immediately upon the acquiring by it of Exhibit 1 constructed its hydro-electric plant (Rec. 6, 68 and 161). Therefore the appellee in no event is entitled to any consideration in equity on account of change by the General Assembly of any public policy declared by the Act of April 9, 1902, even though the law would permit a recovery on account of such change of public policy.

In *Hoagland vs. Railway Co.*, on rehearing 111 Ind. 451, the opinion of the court, after stating that the rights of the appellant were pursuant to a lease which did not convey any other rights than those to the use of surplus water not required for navigation purposes, said with reference to the argument of counsel as to changed circumstances requiring a different construction of the lease:

> "The changed circumstances of which counsel so often speak did not enlarge the subject of the demise. The grantees of the state are not in a different position than that of their grantor so far as respects the subject of the lease. That was not expanded by anything done by them or anyone else."

In the case of *Douglass vs. Pike County,* 101 U. S. 677, this court in considering the law of Missouri in relation to certain bonds, said, at page 687:

> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made."

In relation to applying new decisions, this court said:

> "* * * but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing."

Mr. Justice Hughes in the case of *Virginia vs. West Virginia,* 238 U. S. 202, at page 236 said:

> "The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfilment."

In *Walker Realty Company vs. American Surety Company*, 60 Utah, 435, in the opinion by Thurman, J., on page 452, it is said:

> "The court also indorses as correct the proposition advanced by defendant to the effect that, in order to arrive at the intent of the parties to a contract, we must consider its terms in the light of conditions as they existed at the time the contract was entered into and not in the light of subsequent conditions, which perhaps were not within the contemplation of the parties when they executed the contract. We believe this rule is likewise elementary except in cases where public interests are involved, in which case the parties are presumed to contract in contemplation of the power of the state to modify or abrogate the contract entirely, if necessary for the public welfare by reason of changed conditions."

See also: Beckwith vs. Howard, 6 R. I., 1, 11.
Hubbard vs. Toledo, *supra*, 401.

VI

The furnishing of hydraulic power to a private corporation such as appellee, is a private as distinguished from a governmental function.

Kaukauna Water Power Co. vs. Canal Co., *supra*.
Buckingham vs. Smith, *supra*.
Varick vs. Smith, 5 Paige (N. Y.) 137.

The state in creating the canals and in taking property for that purpose assumed to do so for a governmental or a public purpose, namely, for the purposes of navigation. For the state now to be compelled to devote these canals for the primary purpose of furnishing hy-

draulic power are in effect devoting the lands taken by it for a public purpose to a private purpose, thus violating a duty owing by it to the public.

Kaukauna Water Power Co. vs. Canal Co., *supra*.

Illinois Central R. Co. vs. Illinois, 146 U. S. 387.

Rossmiller vs. State, 114 Wis. 169.

Bradshaw vs. Mill Co., 52 Minn. 59.

While appellee is now manufacturing electricity, there is nothing in any of the leases requiring the water power to be so used and there is no prohibition against a change of use.

In the case of *Buckingham vs. Smith*, *supra*, the Ohio Supreme Court, with reference thereto, said:

> "We know of no instances in which it has, or can be taken, even by state authority, for the mere purpose of raising a revenue by resale, or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state."

The state should not be required to maintain canals at a sacrifice for the exclusive benefit of the lessees of water.

State ex rel. vs. Board of Public Works, *supra*.

The question here for consideration is the vested legal right of the appellee. Buildings have been constructed and expenditures have been made by the appel-

lee which might naturally lead, between private individuals, to a consideration in favor of preserving the water privileges for the appellee to prevent its loss, but the courts will not use discretionary power to give relief for loss which will result to the appellee as the result of the Acts of the legislature in abandoning the canal. The appellee, if it desired to have saved itself from the resulting loss, should have considered the broad powers of the state as shown by the decisions of the courts in interpreting the statutes of Ohio authorizing the leases which have granted to the appellee the rights which it has in the past been enjoying.

VII

Appellee claims that at the time of the making of the Law lease and of the subsequent leases owned by appellee, the canal, by reason of non-use, had been abandoned and thereby all of the water in the canal became surplus water. It will be observed that the bill of complaint (Rec. 5) alleges and the answer (Rec. 30, 37, 43, 50) admits that prior to 1894 navigation on the canal had almost disappeared, and that from 1894 to 1900 navigation on the canal had entirely ceased as a business. Such non-user, however, is distinguished from abandonment; non-user does not create abandonment.

Adams vs. Hodgkins, 109 Me. 361.

Abandonment is a matter of both intention and act; non-user is not of itself abandonment. Whether the act of a party constitutes abandonment depends on intent. Absence from and non-user of property do not prove an

intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis.

Farmers' Irr. Dist. vs. Frank, 72 Neb. 136.

In order to constitute an abandonment of a water right there must be an intent to abandon coupled with some act of relinquishment by which the intent is carried out.

Ranch Co. vs. Argile, 28 Utah 398.

The claim of appellee, therefore, that the state was acting in its proprietary capacity is without force because the board of public works in the making of the leases could not bind the state in its proprietary capacity, for the authority of the board of public works to execute the leases was shown by and limited to the provisions of the Act of March 23, 1840, 38 O. L. 87, with slight amendment, immaterial here, by Sec. 14009, Ohio General Code.

This claim of appellee, it seems to us, is inconsistent with their claim that the Act of April 9, 1902, 95 O. L. 118, Section 14218, General Code, declaring the public policy of the state, that the Miami and Erie Canal should be maintained as a canal has a bearing on this case in favor of establishing vested rights in the appellee; the passage of this Act clearly proves that on April 9, 1902, there had been no abandonment of the canal as a canal. Furthermore, who shall say that this canal was ever abandoned for canal purposes until 1927 when the legislature acted for that purpose? The legislature was the sole authority to abandon the canal, and until it, by legislative enactment, made provision therefor, there could

be no abandonment. Until the Act of May 11, 1927, became effective, the canal was available, and its use could have been resumed at any time. This court is not unfamiliar with recent discussion of plans for a canal from Lake Erie to the Ohio River. As late as 1923 the legislature of Ohio passed House Joint Resolution No. 32, 110 Ohio Laws 638, appropriating money to investigate the matter of water transportation in and about the Great Lakes.

VIII AND XI

The City of Toledo acquired that part of the canal from the Maumee River side-cut northerly, (Lineal Part One) pursuant to the Act of January 22, 1920, 108 Ohio Laws, Part 2, page 1138, Section 14188-15, *et seq.*, of the Ohio General Code. This Act provided for the sale to the City of Toledo of said portion of the canal and in Section 6 thereof authorized a deed in fee simple to the City of Toledo of said property "but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both and the rights of said owners to a renewal of said existing leases; * * *" and in Section 7 it was provided that in case of a lease there should be leased to the City of Toledo said lands "excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing leases, and in case the state's lessees are at any time *under the terms of this Act* deprived of their water privileges the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which

they are entitled * * *." The appellee was one of the lessees referred to in the above quoted portions of said Act. The appellee now claims that said Act and the deed (Exhibit 15, Rec. 133) executed in pursuance thereof created a contract between it and the State of Ohio, the terms of which are impaired by the enforcement of the Act of May 11, 1927.

We deny the claim that there was any contract existing between the State of Ohio and the appellee in relation to the payment of compensation for any loss sustained by virtue of the abandonment of the canal by the Act of May 11, 1927. The state had not, by the Act of January 22, 1920, agreed in any way to protect any rights of any of the lessees. It simply required the City of Toledo, as a condition to acquiring that part of the canal, Lineal Part One, to pay compensation to the lessees for the value of their rights if the City of Toledo in accordance with the provisions of the Act of January 22, 1920, deprived the lessees of their rights under their leases. The language used comes far from creating any liability or obligation on the part of the state to the appellee. The obligation was from the City of Toledo to the appellee conditioned upon the City of Toledo's depriving, "under the terms of this Act" (Act of January 22, 1920) appellee of its rights under leases. It is clear that the state reserved the right unto itself at a future time to declare the abandonment of Lineal Part One and cancel the leases of the lessees having rights therein. The Act provided "and in case the state's lessees are at any time, *under the terms of this Act*, deprived of their water privileges the City of Toledo shall pay such lessees a fair

compensation," etc. Why did the legislature limit the obligation of the City of Toledo to pay for the loss of water to which the lessees would be entitled to receive, to such rights as lessees were *deprived of under the terms of the Act of January* 22, 1920? The claim is made that by virtue of the decision and judgment in the case of *Maumee Valley Electric Co. vs. City of Toledo*, 13 Fed. (2nd) 98, it was adjudged that the state had made a contract for the use and benefit of appellee. The effect of the decision in that case was not determinative of any such question. First of all, neither the State of Ohio nor any of the other appellants, except the City of Toledo, were parties to that case, and secondly, that case dealt with the provisions of the Act of January 22, 1920, insofar as it affected the right of the City of Toledo. The fact was that notwithstanding the express provisions of Sections 6 and 7 of said Act, requiring it to pay compensation to the owners of existing leases for any loss sustained by them if under the terms of said Act they were deprived of their water privileges, the City of Toledo was intending to deprive appellee of its water privileges without compensation, in fact it denied that said lessees were entitled to compensation. We think it clear that the Court of Appeals in its opinion took it for granted that the state had a right to abandon the canal, but the effect of the decision is that the reservations in the deed to the City of Toledo, and the above quoted provisions of Sections 6 and 7 of the Act, made it a condition that the *City of Toledo* could not, under the terms of the Act of January 22, 1920, deprive the appellee of the right to the use of water under its leases without first making compensation.

It was said in the opinion by Knappen, C. J.:

> "The Legislature had, in our opinion, the undoubted power to impose upon the city the conditions in favor of the plaintiff as we have construed them."

And further:

> "The city, by the acceptance of the deed from the state upon the terms and conditions contained in the legislative act, has effectively contracted to respect plaintiff's interests."

The conditions and restrictions resulting from the reservations in the deed from the state to the City of Toledo involved in the decision of the case last above referred to, have no application to the case at bar and no restrictions, reservations or conditions were attached to the Act of May 11, 1927, above referred to.

The City of Toledo is no longer asserting any right to withdraw water from that part of the canal which it acquired in pursuance to the Act of January 22, 1920, until it has compensated the holders of leases. Appellee is not contending that the City of Toledo is making any threat to withdraw water from the canal nor is the City of Toledo in any way attempting to deprive the appellee of the loss of its water pursuant to the provisions of any of the leases. Appellants assert that the State of Ohio has a right to abandon any part of the canal which it still owns and which it intends to devote to public highway purposes.

The Act of January 22, 1920, expressly provided that the same should not be construed as granting the lessees any rights in addition to those granted them in existing leases. See Section 7:

> "And provided further that this Act shall not be construed as granting the lessees any rights in addition to those in their existing leases."

There was no agreement on the part of the city to assume any obligation or agreement toward the appellee unless it would, *pursuant to the Act of January* 22, 1920, deprive appellee of its rights under its leases. The decision in the case of *Maumee Valley Electric Company vs. City of Toledo, supra*, goes no further.

The Act of January 22, 1920, is distinguished from the Abandonment Act in the *Hubbard* case in that the legislature thereby imposed upon Toledo the obligation to compensate the holders of water leases for their rights in the event it should, pursuant to any right granted by said Act, withdraw the water from the canal, whereas, no such requirement was made by the abandonment Act considered in the *Hubbard* case.

IX

The maintenance of the claim of appellee with regard to the Purdy lease would not entitle appellee to an injunction in the case at bar, because the Purdy lease affects the right to use the water on the southerly side of the Maumee River, which would not be affected by the abandonment of the canal pursuant to the Act of May 11, 1927, but as appellee makes certain claims with reference thereto, we will here consider the question.

The rights of the appellee under the Purdy lease do not differ from the other leases in respect to the right of the state to terminate the same by the abandonment of the canal.

By Section 8 of the Act of the legislature of Ohio, passed February 4, 1825, 23 Ohio Laws 50, the canal commissioners were authorized "to enter upon and take possession of and use all and singular any lands, waters, streams and materials necessary for the prosecution of the improvements intended by this Act."

The Act further provided:

> "* * * that in case any lands, waters, streams or materials, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this state, it shall be the duty of the canal commissioners, on application being made to them by the owner or owners of any such lands, waters, streams or materials, to appoint by writing not less than three nor more than five discreet, disinterested persons as appraisers * * *, and it shall be the duty of said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss or damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises * * *, and the canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in this state."

Pursuant to the authority thus granted, the canal commissioners, in the construction of the canal, proceeded in some cases by negotiating with the owners of property and riparian rights and in other cases by appropriating the property or rights and afterwards settling the claims of the owners thereof in the manner provided by the legislature above set out. The effect of this legislation was outlined by the Supreme Court of Ohio in the case of *Ohio ex rel. vs. Railway Company*,

53 O. S. 189, which holds that the mere occupation of the land by the state was a seizure and appropriation thereof, and that the state thereby took the title to the lands, leaving to the former owners simply a claim for compensation.

In the case of Purdy there was no property necessary to be taken by the canal commissioners. The only claim which Purdy asserted was based upon his riparian rights.

In addition to the authority granted by the above general statutes, the legislature, on March 12, 1845, 43 Ohio Laws, p 453, passed a joint resolution relative to the adjustment of the claim of Purdy. In substance it provides:

(a) Authority for the board of public works to negotiate and purchase from Purdy "*the right to which he may be entitled as riparian proprietor*, to the water which the state may want, flowing in the Miami River at the Grand Rapids."

(b) To pay for the same in surplus water of said river, in case Purdy should elect to receive his compensation in that form. The exact language of the resolution in this respect is as follows:

> "And in case the said Purdy shall desire to receive the price agreed on, in whole or in part, in the surplus water of said river, the board shall construct a side-cut from the pool above the State Dam sufficiently large for the purposes of navigation and to carry the water to the mills of said Purdy, with a suitable guard lock therein * * *. And the board may sell to said Purdy, to be taken through such side-cut, so much water as shall be agreed on, so that there shall at all times remain to the state water enough for her purposes of

> navigation, and to supply the hydraulic power, which she shall have rented; and any balance due to said Purdy, by said agreement, shall be paid as damages to others are paid by existing laws for injuries occasioned by construction of the public works."

(c) The resolution further provided for arbitrators to determine the quantity and value of the water to be given to Purdy as part compensation under said agreement in case Purdy and the board of public works were unable to agree thereon.

(d) Purdy was required to "execute a conveyance in fee, in the same manner as by law deeds of lands are made, of his interest in the water so purchased of him."

(e) The board was authorized to "execute to him a lease or other conveyance in fee, of the quantity of water to be conveyed to him free of rent, *in their usual form of lease or conveyance.*"

The proposed settlement with Purdy did not contemplate all of his possible claims, for the resolution closes with the following words:

> "And if the said Purdy shall suppose that he has a legal claim to compensation from the state for the obstruction of water from the river necessary for the purposes of navigation in her canal, the right to apply to the Supreme Court for the settlement of the question of the legality of such claim, in manner as is provided by resolution of this session for certain claimants on the Miami River, shall remain unimpaired to said Purdy."

It is clear that the lease which the board was authorized to make to Purdy was no different from any other lease which the board might make to anyone. Such

leases might have been either for a term of years or in perpetuity, except that under the circumstances in the Purdy case there was no annual rent provided for. This lease was not forced upon Mr. Purdy, but was taken by him voluntarily as part of the consideration for his riparian rights. It gives to him no greater right than that acquired by any other lessee of the state. Whatever right remained in the state to terminate leases by the abandonment of the canal was as inherently a part of the Purdy lease as of any other lease made by the state.

The particular claim of the appellee with reference to the Purdy lease is based upon the wording of the contract which was entered into between the board of public works and Purdy pursuant to the foregoing resolution of the General Assembly.

This agreement is found in the record as Exhibit No. 7, (Rec. 101). In substance the agreement consists of the following:

(a) A recital as to the erection of a dam across the Maumee River at the head of the Grand Rapids.

(b) A conveyance by Purdy in the form and language of a quit claim deed of "his right and interest as riparian proprietor to the use of the water in the Maumee River flowing over the Grand Rapids, over and alongside of his property in and near the Town of Gilead in Wood County, Ohio. That is so much thereof as said state may choose to divert and lease for hydraulic purposes." The deed contained a proviso in the following language:

> "Provided that said Purdy reserves and excepts from said conveyance and reserves to his own use so much of said water to be taken from the pool of the dam aforesaid through the canal

herein described, in any quantity he may desire, during the seasons that the canal is not navigable, until," etc. (Then follow certain limitations as to the amount of water which Purdy was to take from the dam depending upon the height of water in the dam at the time.)

(c) An agreement by the state

"to locate and construct a public navigable canal from the pool aforesaid on the south shore of the river, to the head of said Purdy's mill race in the Town of Gilead and through the same to a point two hundred yards below the head thereof thirty feet wide at the bottom and four and one-half feet deep below the top of the dam, with a descent at the bottom of six inches in the whole length, with a slope in the banks of one foot nine inches base to one foot perpendicular, and construct in said canal a guard gate and other fixtures for the security of the navigation and machinery connected with the canal."

(d) A conveyance of water to Purdy, which is in the following language:

"* * * and the State of Ohio conveys and guarantees to said Purdy and his assigns forever, the right to receive through said canal and use on his own land, the foregoing reserved quantity of water."

Based upon the language used in this agreement, it is claimed by the appellee that the Purdy lease stands upon a different basis than that of other leases. This claim is predicated upon the so-called reservation contained in the proviso above set out. Aside from the proviso in question, there are found in the instrument all of the things contemplated by the resolution of the General

Assembly, to-wit, a quit claim deed by Purdy of his riparian rights; a conveyance to Purdy by the state of the use of water from the dam and canal. We call attention to the fact that the resolution under which the board was acting did not contemplate or provide for any reservation on the part of Purdy, but only for a conveyance by Purdy of his riparian rights and a conveyance by the state of the use of the water.

An important element in the transaction is the fact that the so-called reservation does not even purport to be an "exception" or even a "reservation" of any part of that which Purdy was conveying to the state. On the contrary, it purports to be a "reservation" of a water right produced by the construction of the dam, canal and locks which the state by the terms of the instrument itself was agreeing to construct.

It is also an important element in the situation that the only conveyance by Purdy to the state was of riparian rights. No real estate or other property was involved. After the state has abandoned the canal all of the rights acquired by the state from Purdy will still be there and may revert to his successors in title.

Any one of the foregoing propositions furnishes a complete answer to the claim of the appellee herein so far as the Purdy lease is concerned.

On the proposition that the so-called reservation in the Purdy transaction was neither an exception nor reservation, but merely a stipulation as to the consideration to be paid to Purdy, we call the court's attention to the case of *York Haven Water & Power Company vs. York Haven Paper Company*, decided by the Circuit Court of Appeals, 3rd Circuit, 201 Fed. 270. In this case

the court, in referring to an attempted reservation similar to the one involved here, said at page 276:

> "It was with reference to this artificial water power thereafter to be created that the reservation and its auxiliary covenants were made Clearly this was the creation of a right or interest which had no prior existence as such in the property conveyed. It was a new right or interest and was reserved as a rent or an easement might have been reserved. It was something that was created by and grew out of the transaction. The distinction is well illustrated in this very deed where the grantor 'excepts' a certain lot or parcel of land described by metes and bounds from the grant of the whole tract. The thing excepted was *in esse*, as is the coal or other minerals which are excepted from the grant of the land which they underlie, or the standing timber excepted from the land on which it grows. * * *
>
> We think, therefore, that no right of or title to property was retained by the Paper Company by the reservation contained in its deed to the Power Company. * * * The very existence, as well as the value of the interest reserved, rested in the obligation of the Power Company to construct the works and deliver and supply the water it had stored to the headgates of the Paper Company."

The language of the so-called reservation involved in that case was as follows:

> "Reserving also to the said York Haven Paper Company, its successors and assigns, a sufficient flow of water to enable the said York Haven Paper Company to develop three thousand horsepower for all time after the construction of a contemplated power plant by the said York Haven Water & Power Company, said supply of water to be furnished said York Haven Paper Company without cost or charge to it, by the said York Haven

> Water & Power Company and delivered at headgates to be constructed at the expense of the said Power Company in accordance with plans to be approved by the York Haven Paper Company."

The court, at page 275 of the opinion, said:

> "It is apparent that the distinction between an exception and a reservation here relied upon is vital and substantial, and the question whether the stipulation in the deed be one or the other, is to be determined, not technically or by what the parties have called it, but by what was the essential character and quality of the interest or right sought to be reserved."

At page 278 of the opinion the court uses the following significant language:

> "In the case at bar, the covenants are to supply and deliver at plaintiff's headgates so much water power *for all time*, and for all time the Power Company must itself refrain from using the water power created by its extensive and costly works until the water power stipulated for has been furnished to the plaintiff. A perpetual and continuing performance is of the very essence of the covenants, and involves an enormous outlay of money and continuous effort on the part of the defendant. We think that the court below should not impose upon itself the duty of enforcing through the indefinite future the performance of such a contract."

The lower court, in the above case, had granted a perpetual injunction restraining the power company from appropriating for use at any time for any purpose whatsoever any water in the forebay of the said power company necessary to allow a sufficient flow of water at the said headgates to develop three thousand horse-

power. The Circuit Court, at page 281 of the opinion, said:

> "We think the ends of justice and the equities of the case require a reversal of the decree below, and the dismissal of the bill without prejudice. And it is so ordered."

X

The Minor lease (Exhibit 8, Rec. 104) is involved in the case of *Kirk et al. vs. Providence Mill Company*, number 675 on the docket of this court. The Minor lease is distinguished from the leases (Exhibits 1 to 6) in the case at bar in that the Minor lease, similar to the Purdy lease, was executed in relation to an adjustment by the state in the appropriating of property for the purposes of the canal. The question of law involved is fully discussed in relation to the Purdy lease, but we desire to suggest that equities in favor of the Purdy and Minor leases would not entitle the appellee in the case at bar to an injunction on account of the leases (Exhibits 1-6, inclusive), because the canal could be discontinued at the site of the Providence Mill Company, Lock Number 9, and the water drained off at that point.

The appellee in the court below contended that the decision of the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company*, 114 O. S. 437, changed the rule as expressed in the cases of *Hubbard vs. Toledo*, *Fox vs. Cincinnati*, *Elevator Company vs. Cincinnati*, *State ex rel. vs. Board of Public Works*, and *Voight vs. Railroad Company*, and other pronouncements of the courts of Ohio holding that the use of the canal for hydraulic power was an incidental purpose, and that the State had a right to terminate

leases for surplus water by abandonment of the canal without liability to the holders of the leases.

In our analysis of the *Middletown* case we must consider the previous decisions of the Supreme Court of Ohio on the question here under consideration, and also the facts in that case.

In the case of *State ex rel. vs. Board of Public Works, supra*, a similar objection was raised as to a lease containing provision for the State to at any time resume the use of canal water leased for hydraulic purposes, in which it was specifically provided that the state should pay for lasting improvements put on the property by the lessee. The court held that the state had the right to terminate the lease and the lessees thereof were not entitled to compensation on the ground that the board of public works possessed no power to surrender the duty of performing the public trust committed to their charge by the statutes of the state, by failing, when the public policy of the state required, to resume the water of the canal whenever the same was needed for public use, untrammeled by any condition or any right of the lessee to prevent it, and that the terms and provisions of leases must correspond to the provisions of the Act of March 23, 1840.

Again, in the case of *Voight vs. Railroad Co., supra*, the law on the subject is set forth in the syllabus as follows:

> "Contracts made with the Board of Public Works or other agents of the state, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the state and no action will lie against the state for damages resulting from such abandonment."

The facts disclose that the board of public works, in consideration of the owner of a certain grist mill granting to the state the right to construct a canal through his lands, agreed to enlarge and forever maintain a dam across the Hocking River above the grist mill so as to afford an ample supply of water both for the canal and for the mill. That canal, by an Act of the General Assembly of May 18, 1894, was abandoned for canal purposes and leased to the Columbus, Hocking Valley and Athens Railroad Company for the construction of a railroad. The owner of the lease at the time of the abandonment sought to enjoin the railway company from entering upon the lands purchased upon the ground that the abandonment of the canal would impair the contract made between the state and his predecessor in title, to whose right he had succeeded. While the court held the Act of Abandonment specifically provided that the railway company should compensate any such property holder, yet, on the question of the right and power of the General Assembly to abandon the canal and thereby terminate all contracts made by the board of public works or other agents of the state for the use of the water of the canal, the case was disposed of by the court on the ground that the state was under no obligation to keep up the canal for the purpose of navigation after the canal had become useless for such purpose and had been abandoned, and *that the agents of the state had no power to make a contract to so bind the state.*

The construction of the Act of March 23, 1840, by the *Hubbard, Fox and Elevator Company* cases was thus reaffirmed.

To hold as a matter of law that the General Assembly cannot abandon a canal for navigation purposes and direct that the lands shall thereafter be used for state highway purposes without first compensating lessees of surplus water, would require the impossible thing of assessing the value of a water right in perpetuity or require the state to forever keep up and maintain dams, canals, feeders, etc., at the expense of the people of Ohio for all time, irrespective of the loss thereby occasioned to the state.

This contention of the appellants was adopted by the Circuit Court of Appeals in the case of *Maumee Valley Electric Company vs. City of Toledo, supra*, in which there was a discussion of a number of Ohio cases; and with reference to this question at page 101 said:

> "Broadly stated, the city's defense is this: (a) Plaintiff's leases were only for surplus water, not needed for navigation purposes; (b) *the state had power at any time to abandon the canal for purposes of navigation*, and the Act of 1920 worked such abandonment; (c) there then remained no such thing as surplus water; • • •
>
> The abstract propositions numbered (a), (b), and (c), *supra*, as there generally stated, were applied to the facts existing in *Hubbard vs. Toledo*, 21 Ohio St. 379; *Elevator Co. vs. Cincinnati*, 30 Ohio St. 629, 643; *Fox vs. Cincinnati*, 33 Ohio St. 492; *Id.*, 104 U. S. 783, 26 L. Ed. 928; *Cincinnati vs. Rogers*, 16 Ohio App. 139; *Kaukauna Co. vs. Green Bay, etc., Canal*, 142 U. S. 254, 274, 12 S. Ct. 173, 35 L. Ed. 1004; and in denial of right of action by lessees of 'surplus' water because of abandonment by the state of one portion or another of the Miami & Erie Canal for navigation purposes."

The Circuit Court of Appeals assumed for the purposes of that case "that plaintiff could not prevent the cutting off by the state of plaintiff's water privileges even though the state was being put to no expense for maintaining the canal."

This interpretation by the Circuit Court of Appeals was after the decision of the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company, supra*, which was considered and cited in the opinion (see page 102).

We must consider the *Middletown* case in the light of the rules of the Supreme Court of Ohio, which provide that the law of the case is stated in the syllabus which is required to be submitted to the judges before publication, but there is no such requirement as to the opinion of the judges. Rule VI, entered January, 1858, 5 O. S. vii; 73 O. S. x, Rule VI; 94 O. S. ix, Rule VI; *Baltimore & Ohio Railroad Company vs. Baillee*, 112 O. S. 567; *Railway Co. vs. Dittey*, 232 U. S. 587-589.

The *Middletown Hydraulic Company* case in order to overrule the *Hubbard, Fox, Elevator Company, State ex rel.*, and *Voight* cases, *supra*, no doubt would have expressly so stated, but the Supreme Court failed to make any statement to that effect. Neither the syllabus nor the opinion of Judge Robinson mentions the cases of *Hubbard, Fox, Elevator Company, State ex rel.*, or *Voight*, nor the principles of law thereby established. The syllabus of the case does not impliedly overrule any of the prior decisions above referred to; besides, out of a consideration of the decision of the Supreme Court of Ohio in *State ex rel vs. Edmondson*, 89 O. S. 107, and the

rules of the court and the *Baillee* case, *supra*, the syllabus of the *Middletown* case must be held to contain the law of the case restricted to the facts therein. Under these circumstances we point out the following points of difference between the earlier decisions of the Supreme Court of Ohio above referred to and the *Middletown Hydraulic Company* case.

First: In the *Middletown* case there had been no abandonment of the canal for either navigation or hydraulic purposes.

Second: The *Middletown* case was an action in *quo warranto* to determine by what right the hydraulic company was taking water from the Middletown feeder. The question of the right of the plaintiff upon the abandonment of the canal by the General Assembly was not involved.

Third: The "reservation" or "exception" involved in the *Middletown* case was of the use of the mill race and the water flowing through the same, of which the predecessor in title of the hydraulic company was in actual enjoyment at the time.

Fourth: The "reservation" or "exception" in the *Middletown* case was in the deed from the owner of the land to the State of Ohio, whereas, the alleged "reservation" or "exception" in the Purdy lease was in the lease or agreement from the State of Ohio to Purdy and not a part of a conveyance from Purdy to the State of Ohio.

From the facts in the *Middletown* case it appears that in 1824, when the state began the construction of the Miami canal, it found one Mr. Enoch in possession of a dam near the site selected for the state dam and a

mill race, by the use of which he was engaged in the operation of a mill. The state negotiated a contract with Enoch, under which it occupied his mill race with its feeder and head gates, in which a weir or gauge was placed "for the purpose of continuing to Mr. Enoch the use of the water as before the construction of the canal."

Mr. Enoch conveyed to the state by deed the lands which were occupied by the site of the canal and the towing paths, feeders, aqueducts, reservoirs, spoil banks and culverts connected therewith, and in that grant to the state inserted the following language:

> "All water privileges reserved to myself as to mill seats," etc.

There was no taking of the property of Enoch by the state, nor was there any conveyance to Enoch by the state of water rights. On the other hand Enoch voluntarily granted certain lands to the state, including the land upon which the mill race was located, and reserved from that conveyance the water power which he was then using. That water power never became the property of the state for it was never taken, appropriated or purchased by the state. The conclusion of the court in the *Middletown* case was that what the state acquired under the Enoch grant was a limited grant and a partial possession. The opinion is chiefly devoted to a discussion of the power of the canal commissioners to take such a limited grant or partial possession, and the determination of the case turned upon the decision of the court that it was possible and legal for the canal commissioners to take such a limited grant or partial possession.

It necessarily followed, therefore, that the successors in title to Enoch were entitled to take water from the feeder and that was the only question determined in the case. *It does not follow from the Middletown case that the state is obligated to maintain the dam or the feeder for the benefit of the successors of Enoch.*

In the particular paragraph of the opinion of Judge Robinson in that case, relied upon by counsel for the appellee, Judge Robinson is careful to say that:

> "* * * the rights of the state, as such proprietor, *in this particular property*, which have not heretofore been judicially determined,"

and which were to be determined then for the first time. To our minds this language shows that Judge Robinson had thoroughly in mind the previous decisions of the court and that he entertained no purpose of changing the rule so well established. Besides, as has been shown, Judge Robinson in writing the opinion had no power or authority to overrule any previous decision of the court nor to change the law as determined by the syllabus of the case.

The controlling point in the decision of the *Middletown* case was the fact that Enoch and his successors in title did not hold the rights there involved under any grant of any kind from the State of Ohio. However, if we should give to the opinion of Judge Robinson the effect of establishing the law of the case, we think he makes this point entirely clear and says at page 450 of the opinion:

> "We think it may be conceded, *notwithstanding the reservation from the grant*, that, if the occupancy by the state of this particular feeder and the land upon which it is located had been exclu-

> sive and in denial of the claimed rights of Abner Enoch, the occupancy by the state of this feeder would have amounted to an appropriation of Abner Enoch's lands and water rights and relegated him, as to remedy, to a recovery of the value of his property and water rights, but the State of Ohio during all this period, not only abstained from such occupancy as would appropriate the lands and water rights of Abner Enoch, but by its departmental construction affirmatively recognized his joint occupancy, so that the time, to this day, has not come when Abner Enoch, or his successors, could have the value of these property rights ascertained and compensation therefor awarded."

In the case of Purdy, the state did acquire from Purdy his riparian rights. He was afforded the opportunity of ascertaining and receiving compensation therefor. His compensation was determined and awarded to him and it consisted, not of the retention by him of something which he was already using, but of another and different use of water created by the construction of the dam and canal by the state. All of these considerations must be borne in mind in considering the effect of the statement so much relied upon by the appellee's counsel that the state is now engaged in the operation of a great power plant for the sale of power and water to private individuals and that the rights of the state, as such proprietor, are to be measured accordingly. No one is contending in this case that the appellee has not the right to continue to use the water from this canal during the valid term of each lease until abandonment of the canal for navigation purposes. That is the only obligation which the state assumed, and that obligation it is not un-

dertaking to avoid. What the state is doing is now asserting its right to discontinue this canal as a canal and to devote the property of the state occupied by it to another public purpose. The right of the state to subserve the best interest of the public in the use of the property of the state cannot be circumscribed by applying thereto rules which might apply to the affairs of private individuals, nor can its right to change the nature of the use of public property be denied for the benefit of a few private individuals or corporations.

We do not question the statement in the case of *Cleveland Terminal & Valley Railroad Company vs. State ex rel.*, 85 O. S. 251, quoted by Judge Robinson at page 448 of the opinion of the *Middletown* case, that where the state has granted and conveyed lands it will not be permitted to revoke such a grant made upon a valuable consideration which it retains. It does not, however, follow that because the state has granted to private individuals rights incident to a public use of state property that the state is thereby forever barred from abandoning the particular public use and devoting the property to another public use.

The *Middletown* case, because of the reservation or exception in the deed from Enoch to the state, restricted the nature of the title of the state to the lands thus conveyed to it; this feature of the case seemed to disturb Judge Jones and prompted his dissenting opinion because he thought that it was in conflict with the law laid down in the *Malone* case 34 O. S. 541. But the *Middletown* case did not affect nor involve the question of the power of the state to abandon her canals and devote the property to another public use. The Supreme Court of the State of Ohio has not changed the rule which has

existed for many years on that question, and the *Middletown* case affords no justification whatever for changing a proposition of law so thoroughly settled by the Supreme Court of the State of Ohio and recognized so clearly by the Supreme Court of the United States.

The District Court (Rec. 174) recognized that the principles announced in the *Hubbard, Elevator Company, Fox, State ex rel. vs. Board of Public Works,* and *Voight* cases had become the established law of Ohio. But held that thereafter the position of the state had changed from that of operating the canal as a navigable highway to the operation of a power plant for the sale of power and water to the public; that the contracts under consideration must be viewed in the light of changed and altered circumstances and that this change may call for a different solution if the altered or changed conditions warranted. The court seems to indicate that the *Middletown* case calls for a different rule of law than that established by the cases above referred to. While we believe that it is beyond doubt that the *Middletown* case did not attempt to change the established law of Ohio, still this court ought not say that the law of Ohio established for sixty years can be so set aside. The rule of this court on that subject, we think, is well stated by Mr. Chief Justice Waite in the case of *Douglass vs. Pike County, Missouri, supra.* We quote from the opinion on page 686, as follows:

> "As a rule, we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, *we have never felt ourselves bound to follow the latest decisions, if thereby contract rights*

which have accrued under earlier rulings will be injuriously affected."

This court in *Harding vs. Jordan*, 140 U. S. 371, had under consideration a case where there had been an established law of the State of Illinois. A recent decision seemed to have cast doubt upon the force of the earlier decisions. On this subject this court, through Mr. Justice Bradley, said on pages 384-385:

> "If it were not for the decision of the Supreme Court of that state in the case of *Trustees of Schools vs. Schroll*, 120 Ill. 509, 9 West. Rep. 741, we should not have the slightest hesitation on the subject. And we cannot divest ourselves of the impression that the opinion of the court in that case on the subject in hand is anomalous, and opposed to the entire course of previous decisions in the state. It is our judgment that the law of Illinois in this regard is the common law, and nothing else; • • •.
>
> "That the common law is the true and only law of Illinois on the subject of land titles, • • • is so clearly shown by the statutes, and by the whole course of the decisions of the Supreme Court of that state, that it hardly needs any argument to support the proposition."

After a review of the earlier Illinois cases this court disregarded the later decision and decided the case upon the law of the state, established by a long line of earlier cases.

CONCLUSION

It is apparent from the statement of this court in the case of *Calder vs. Michigan*, 218 U. S. 591-598, that activities of officials of the City of Toledo and Lucas County, Ohio, in advocating the passage of the Act of May 11, 1927, does not entitle the appellee to any ad-

vantage nor does it detract from the force and effect of said legislation.

We have not here urged that the question here presented might become moot if the appellee had pursued its application (Exhibit 19, Rec. 140) for a renewal of the leases, by requiring the officers of the state to comply with the provisions thereof, if enforceable, in the event the officers of the state should be required to receive bids so as to determine the highest responsible bidder and thus give the lessee the option of taking the lease at the rent to be paid by such highest responsible bidder (Rec. 72, 80, 86, 92, 99).

It seems to us unnecessary to give any attention to this detail, for the law of Ohio clearly entitles appellants to a reversal of the judgment of the District Court and to a dismissal of the bill of complaint.

Respectfully submitted,

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APPENDIX

I

Act of March 23, 1840. 38 Ohio Laws 87.

Swan's Statutes of Ohio, 1841, pages 174 to 200.

Sections 14009 to 14013, inclusive, of the General Code of Ohio, 1910 Edition.

* * *

"Sec. 20. Whenever in the opinion of the Board of Public Works there shall be surplus water in either of the canals, or in the feeders or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, the said commissioner may order such surplus water, and any lands granted to, or purchased by the state for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity, or for a limited number of years, for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state.

"Sec. 21. The provisions of the foregoing section shall extend to and include the water passing around locks from one level to another, on either of the canals of this state.

"Sec. 22. No hydraulic power, nor right to the use of any water, shall be sold, leased or conveyed, except

such as shall accrue from the surplus water of the canal, feeders or dams, or from the water passing around any lock, after supplying the full quantity necessary for the purposes of navigation.

"Sec. 23. Every lease, grant or conveyance of water power, shall contain a reservation and condition that the state or its authorized agents may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns."

* * *

II

Act of March 21, 1917, 107 Ohio Laws 418, Sec. 14009 of the General Code of Ohio.

"Sec. 1. That section 14009 of the General Code be amended to read as follows:

Sec. 14009. Whenever, in the opinion of the superintendent of public works, there shall be any surplus water in any of the state canals, or in any of the feeders, or reservoirs, or at any dams created by the state for

the purpose of supplying any of said canals with water, or erected for improving the navigation of any river, over and above the quantity of water which may be required for the purpose of navigation, said superintendent of public works may sell or lease the right to use such surplus water for hydraulic or other purposes, for any term not exceeding twenty-five years for a certain annual rental, or otherwise, as he may deem most beneficial for the interests of the state, subject to such conditions, reservations and restrictions as he may deem necessary and proper. All rentals shall be fixed by the superintendent of public works with the approval of the governor and attorney general.

Provided, however, that nothing herein contained shall be so construed as to authorize the superintendent of public works to sell or lease the right to use water at any time for any purpose or to such an extent as to prejudice, abrogate or supersede any of the water rights heretofore granted by the state to the City of Akron by an act entitled 'An act to provide for granting to the City of Akron the right to use and occupy certain waters and lands of the state for water works and park purposes' and being sections 14203-1, 14203-2 and 14203-3 of the General Code.

Sec. 2. That said original section 14009 of the General Code be, and the same is hereby repealed."

III

Act of April 9, 1902—95 Ohio Laws 118-120.

Vol. 1 Bates Annotated Ohio Statutes, 4 ed., pages 189-190.

"Sec. 2. That all boats hereafter built for use upon either of said lines of canal for freight transportation shall be paid for by the state at their then true value in money if, at any time in the future, the policy of the state shall be changed by abandonment of either or both of said lines of canal so as to make such boats useless for transportation purposes."

IV

Act of January 22, 1920, 108 Ohio Laws Part 2, 1138.

"Sec. 6. In case the City of Toledo signifies its intention to purchase said property, the governor is hereby authorized, as soon as the purchase price for said canal property has been paid into the state treasury, to execute a deed conveying said property in fee simple to the City of Toledo, Lucas County, Ohio, but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing lease, which deed before delivery shall first be approved by the attorney general."

"Sec. 7. In case the said City of Toledo by resolution of its council, shall signify its preference for a lease of said canal property, the superintendent of public works, subject to the approval of the governor and attorney general, is hereby authorized to execute and deliver to the said City of Toledo, a lease conveying to said city all the right, title, and interest of the State of Ohio in and to said abandoned canal property, either in perpetuity or for a term of years, excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to

a renewal of said existing leases, and in case the state's lessees are at any time, under the terms of this act, deprived of their water privileges, the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which they are entitled, and in case the amount of compensation cannot mutually be agreed upon, the City of Toledo shall proceed under the provisions of the General Code, to condemn the rights of such lessees for the use of said municipality; provided, however, that no new leases shall be executed for either water or land rights upon any portion of the canal property described in Section 1 hereof during the three-year period referred to in Section 5 hereof; and provided further, that this act shall not be construed as granting the lessees any rights in addition to those granted them in their existing leases."

V

Act of May 11, 1927, 112 Ohio Laws 360-363, Sections 14178 to 14178-12, General Code of Ohio.

Sec. 14178. Portion of Miami and Erie Canal abandoned; description.

"Sec. 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be, and the same is hereby abandoned for both canal and hydraulic purposes: Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof, as defined by Buchanan's survey, to a point where said canal joins with the Maumee River, on the

westerly side thereof, in Providence Township, Lucas County, Ohio."

Sec. 14178-1. State of Ohio reserves title to all lands and waters.

"Sec. 2. The State of Ohio reserves unto itself, the title to all lands and waters to which it is entitled under the various acts, providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal, including all lands used for lock houses, waste ways or for other purposes and now the property of the State of Ohio."

Sec. 14178-2. Lands to be held for state in fee simple.

"Sec. 3. So much of said lands as were used and occupied by the Miami and Erie Canal shall be forever held for the State of Ohio in fee simple, and held by the state for the purpose of constructing upon the said lands, a highway, to be erected, constructed and improved at such time or times as the State of Ohio may hereafter, either by legislative enactment, or otherwise, find proper and convenient."

Sec. 14178-3. When existing leases shall become null and void.

"Sec. 4. All leases heretofore granted to any person, firm or corporation, for canal or hydraulic purposes on that part of the Miami and Erie Canal described in Section 1 of this Act shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done."

Sec. 14178-4. Abandoned portion under supervision of state highway director.

"Sec. 5. The abandoned portion of said canal shall be under the supervision and control of the state highway director, to be devoted to highway and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to, and he shall, within sixty days from the taking effect of this Act, drain the water of said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal."

Sec. 14178-5. Surveys and maps to be made.

"Sec. 6. As soon as practicable, after this Act goes into effect, the director of highways of the State of Ohio shall cause surveys to be made of the canal property herein abandoned, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio, adjacent thereto, and file a copy thereof with the governor."

Sec. 14178-6. Making of plat or plan.

"Sec. 7. The director of highways is further directed to make a plat or plan, showing the highway, its length, grades and width of so much of the canal property as may be used for such highway purposes, and all other lands adjacent thereto that may be leased for other purposes."

Sec. 14178-7. Use of lands before highway is constructed and improved.

"Sec. 8. Until said highway shall be constructed and improved, no portion of the lands within the plat or plan showing such highway shall be leased for any pur-

pose whatever, but until the State of Ohio shall construct and improve said lands for a highway, all municipal corporations through which said highway shall pass when completed, and the commissioners of Lucas County, Ohio, shall be permitted to use said canal lands for public purposes only, without compensation."

Sec. 14178-8. Leasing of adjacent lands; manner.

"Sec. 9. All other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes may be leased under the direction of the director of highways, in the following manner:

The said director of highways shall cause said lands, not to be used for said highways, to be appraised and a report of said appraisement filed in the office of the governor, and one copy left in the office of the director of highways.

After said lands are so appraised, and upon application therefor, the lands not needed or required within said highway may be leased to any applicant for a period not to exceed fifteen years, and with the right of renewal for an additional fifteen years, upon a rental equal to six per cent per annum upon the value of the appraisement so made, and at the end of fifteen years, said lands shall be reappraised and likewise leased to such applicant.

Provided, however, that if any municipal corporation, Lucas County, township, or other taxing district desires to lease any portion of said lands not required for said highway purposes, the same shall be leased to such taxing district upon a rental of four per cent per annum.

Said application shall be made in writing, upon

forms provided for that purpose, and shall clearly describe the lands covered in said application, and shall state the term of years for which such lease is desired, and shall be signed by a public officer, duly authorized by the public authorities of the city, village, or other political subdivision making said application, and when the same shall be desired by any political subdivision.

Before granting any lease to any private individual, notice of the filing of such application shall be given to the public official of any municipal corporation, county, township, or other political subdivision in which said lands are located.

If, within thirty (30) days after such notice such officer of the political subdivision makes no application to lease said lands, the same may be leased to private persons, firms or corporations, and such application made by such private persons, firm or corporation shall be made in writing upon forms provided for that purpose, describing the lands covered in the application, the term of years for which the lease is desired, and be signed by such person, firm or corporation, and filed in the office of the director of highways of the State of Ohio.

In the event that any leases granted herein are renewed at the expiration thereof, the same shall provide for a reappraisement by proper state authorities, upon the expiration of each fifteen-year period, and the rate of rental upon such new appraisement shall be made in the same manner as the original appraisement."

Sec. 14178-9. Right to remove bridges, to grade and construct roads and streets.

"Sec. 10. The county commissioners of Lucas County, the council or other legislative body of any mu-

nicipality or township through which said abandoned canal passes, shall have, and are hereby granted, the right to remove all existing bridges, crossing said abandoned portion of said canal over which county roads, city or village streets or township roads pass, and to grade and to construct such roads and streets across the channel of said abandoned portion by necessary fills and grades in the channel thereof and to such grade as shall be approved by the director of highways, and the county commissioners of Lucas County are authorized to drain the water of said abandoned portion, and to prevent the water from the river from flowing into or through said abandoned part of said canal, but reserving all rights of the State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadway, not in conflict therewith."

Sec. 14178-10. Sale prohibited; exception.

"Sec. 11. No portion of the canal lands and lands adjacent thereto and herein abandoned shall ever be sold, except by specific authority of the General Assembly of Ohio."

Sec. 14178-11. Defining term highway director.

"Sec. 12. The term highway director, as used herein, shall be construed to mean any officer, commission, board or department that may be established by law for the control of public highways."

Sec. 14178-12. Repealing section.

"Sec. 13. That all Acts or parts of Acts in conflict with this Act be, and the same are hereby repealed."

IN THE

Supreme Court of the United States

No. 674

October Term, 1928

HARRY J. KIRK ET AL.,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

REPLY BRIEF ON BEHALF OF APPELLANTS

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As to the claim of appellee to rights based upon a renewal of the leases as the result of its application for

renewal (Exhibit 19, Rec. 140), we call attention to the authorities cited by counsel which are cases in which the lessee had an absolute right to a renewal. The respective rights of renewal of appellee, as provided for in Exhibits 1, 3, 4, 5 and 6, are optional in that after determining the amount bid by the highest bidder, the appellee would have the option to a renewal if it would agree to pay the amount bid by the highest bidder. Application for renewal (Exhibit 19) claimed a right to a renewal of the Law supplemental lease (Exhibit 2). This supplemental lease was not entitled to a renewal, as has been shown; therefore, the superintendent of public works had a right to disregard the application for renewal. But even though he had no such right to disregard the application for renewal, steps were required by him to be taken before such renewal became effective. Therefore, if appellee felt that it had any right to obtain a renewal of any of the leases, it had its remedy in court to compel the superintendent of public works to take such steps as would entitle it to such a renewal. Counsel for appellee in their brief suggest that the Law supplemental lease (Exhibit 2) was to run contemporaneously with the Law lease (Exhibit 1); it does not so state, but on the contrary by paragraph 9 (Rec. 76) it expires on March 12, 1925.

Counsel for appellee cite many authorities in their attempt to show that this court ought not to follow the decisions of the state court in the *Hubbard* and other like cases, but that this court should determine the interpretation of the Act of March 23, 1840, and of the leases under which appellee is claiming. But this court has already determined the law to be in accordance with

that established by the Supreme Court of Ohio. Counsel seem to be unmindful of the opinion of this court in *Walsh vs. Railway Company*, 176 U. S. 474, in which it was said, with reference to the decisions of the Supreme Court of Ohio above referred to:

> "Were the question one of doubt, we should hesitate long before refusing to defer to the many opinions of the Supreme Court of Ohio, through several changes in its personnel, holding it to be within the power of the state to abandon the canal for other public purposes, and that such abandonment gave no right of action to private parties incidentally affected or damnified by it."

Counsel for appellee cite the case of *Cleveland, etc., Railroad Company vs. Ohio ex rel.*, 85 O. S. 251, as the basis for their claim that the state was acting in a proprietary capacity at the time of the making of appellee's leases. The facts in that case show that the canal had been abandoned, and the state, owning a fee simple title to the land, conveyed the same to the City of Cleveland. This conveyance was pursuant to an Act of the legislature authorizing the same. Here we have certain leases which were made while the canal was being devoted to a public purpose. These leases were made in pursuance of the Act of March 23, 1840, the terms of which are a part of the leases, and the subject matter of the leases is water power which the state is taking under its sovereign power, and which is now being devoted to a private use.

Counsel for appellee approach their argument in this case as though the state had denied the validity of the agreements of lease upon which appellee relies. Such, however, is not the case. These agreements in the

absence of an abandonment of the canal would have been enforceable.

The decision of the Supreme Court of Ohio in the *Middletown* case, 114 O. S. 437, involved the question as to the extent and nature of the conveyance from Enoch to the state; the portion of the canal involved had not been abandoned. It was held that any use by the state in taking only a part of the water which flowed with Enoch's rights, confirmed the claim that Enoch had reserved to himself a part of his water rights which were not conveyed to the state. This is further confirmed by the decision of the case on its merits. 116 O. S. 26. There had been no abandonment of the canal by the legislature; this is an important distinction from the case at bar. Other points of difference between the *Middletown* case and the case at bar, as we have heretofore pointed out, we need not restate.

Counsel for appellee say that the Acts of 1898 and 1902 recognized the rights of the appellee under its leases and seem to argue therefrom that appellee thereby obtained greater rights than called for in the respective leases. We see nothing in either of these Acts which would extend the rights or privileges granted under the leases of appellee. Until the abandonment of the canal by the Act of May 11, 1927, the leases were valid; no claim was ever made that they were not valid leases. A recognition of their validity would not enlarge their grant.

It is argued that Section 3 of the Act of April 9, 1902, shows a different public policy as to the Ohio Canal from the one determined by Section 1 as to the Miami and Erie Canal. It seems to us that this section

implies a question in the minds of the legislature as to the advisability of continuing the Ohio Canal as a public canal, and for that reason authorized an investigation to be made as to that canal, but the legislature seemed to be clearly of the opinion, without any investigation, that it was advisable to continue as a canal the Miami and Erie Canal. Section 4 of the Act, which provides for a revision of rates, could not have applied to any of appellee's leases which were then in effect. How a revision of rates would have enlarged or changed the provisions of any grant is not apparent. This Act in no way modified, changed or enlarged the powers of the board of canal commissioners or the board of public works, nor of the successor to its duties, the superintendent of public works.

Much has been said about provisions of certain of the leases which provide for payment of certain expenses by lessees, thus relieving the state from liability therefor. But there are expenses of the state well recognized, which are not assumed and not taken care of. The expenses as to the bridges shown to exist by the Act of May 11, 1927, are items which are not assumed by any of the appellee's leases, besides, as the Law supplemental lease has now expired, other expenses of the state in the maintenance of the canal must also be considered as having influenced the legislature to abandon the canal. When one considers that the state received from the City of Toledo $300,000.00 for the canal lands from Maumee to Toledo, which at normal rates of interest would realize to the state at least twice as much as it was getting out of its water leases located on the canal from Providence to Toledo, an added consideration is

apparent for the desire of the state to eliminate the canal. Other reasons for abandonment are also apparent, namely, to eliminate nuisances which would have an effect upon public comfort and health, to eliminate the danger where the canal borders on present public highways, and many other considerations of like character. Besides, it is apparent that the canal bed will furnish a most excellent right of way for highway communication required by increased traffic.

Counsel for appellee argue that the Acts of January 22, 1920, and March 27, 1925, have the effect of a ratification by the state of the agreements of lease of appellee. These agreements of lease were at that time valid leases. There was no question as to the authority of the officers of the state in their execution; therefore, nothing was accomplished by the so-called ratification. But they were not ratified; they were simply recognized as valid agreements. There was no attempt by said Acts to enlarge the provisions of said agreements, and any agreements thereafter made between the officers of the state and appellee in relation thereto. The agreements after the passage of said Acts were subject to the same interpretation as they were prior to the passage thereof, namely, that they were subject to cancellation by the state upon abandonment of the canal without any liability on the part of the state to the holders thereof.

It is argued that by virtue of the Act of January 22, 1920, as interpreted by the decision of the Circuit Court of Appeals in the case of *Maumee Valley Electric Company vs. Toledo*, 13 Fed. (2d) 98, there was an agreement by which the state had promised a court to protect the rights and interests of appellee under its

leases. As we have pointed out in our main brief, such was not the agreement, but if we accept the argument of counsel that for any such agreement to be valid it must be shown that there was some obligation on the part of the state to the lessees, then appellee's claim must fail for there is no such obligation on the part of the state. The decision of Knappen, C. J., in 13 Fed. (2d), *supra*, does not hold that there was an obligation on the part of the state toward the appellee, but holds that the state had a right to require compensation to be made by the city if the city should drain the water from the canal pursuant to the Act of January 22, 1920. It is argued that the state had some moral obligation to the appellee. We fail to see any reason for a moral obligation. The appellee took its leases with full knowledge of the meaning thereof as interpreted by the Supreme Court of Ohio and this court in numerous decisions. If pursuant to the Act of May 11, 1927, the water is drained from Lineal Part Two, it will be by the State of Ohio. The fact that appellee has no remedy in that event entitles it to no sympathy, certainly to no equity, for it knew when it took its leases that whenever the state desired to abandon the canal it could do so without liability to the holders of water leases. The fact that the legislature sought to require the City of Toledo, as between it and the holders of leases, to pay compensation, is quite different from attempting to rest an obligation on the state to pay compensation. The rights on the part of appellee spring from the agreements, which are subject to the interpretation that the state is not liable on account of the abandonment of the canal.

It is argued that in view of Section 8 of the Act of 1825, the appellee acquired by its leases some special property or title in the water. The case of *Malone vs. Toledo*, 34 O. S. 541, does not hold that the state acquired fee simple title to the water; in fact, the decisions of the Supreme Court of Ohio in the case of *Cooper vs. Williams*, 4 Ohio 253, and in the case of *Buckingham vs. Smith*, 10 Ohio 297, expressly hold that water cannot be acquired in fee simple. We do not understand the decisions to hold that the state acquired a fee simple title in flowing waters; in fact, we think the early Ohio decisions cited in our main brief are to the contrary.

The conclusion urged by counsel for appellee, that in acquiring waters the state was not expressly prohibited from using them for purposes other than navigation, was not and could not have been for consideration in the *Middletown* case, because the state in that case was not attempting to use water acquired by it for purposes other than navigation. The water which Enoch and his successors in title were using belonged to Enoch by right of use. This is all that was held in the *Middletown* case. This is distinguished from the claim of appellee that the state had the right to use the water for purposes other than navigation. We think it is clearly decided by the earlier Ohio cases cited in our main brief, as well as the general law on the subject, including the decision of this court in the case of *Kaukauna Company vs. Green Bay, etc., Canal*, 142 U. S. 255, that such right obtains only for a public purpose.

Let us suppose that the agreements of lease in the case at bar had expressly provided that in case of a termination of these leases the state would compensate

the lessees for their losses sustained. Such an agreement, we think, would be clearly invalid because the board of public works was not authorized by the Act of March 23, 1840, to make such an agreement. *State ex rel. Fanger vs. Board of Public Works*, 42 O. S. 607. In paragraph 3 of the syllabus it is held:

> "Hence, a clause providing that on such resumption of surplus water and termination of the lease, the board of public works shall pay to the lessee the value of the lasting improvements erected for the use of such water, is a restriction on the performance of a public duty, and is unauthorized and void."

Notwithstanding this express ruling, it is sought here to engraft an implied liability on the part of the state where an express agreement would be invalid. In that case there was a resumption of water by the board of public works. The results of abandonment are identical with the results of resumption, as is shown by the *Hubbard* and other kindred cases.

Fox vs. Cincinnati, 104 U. S. 783-785.

As is shown by the *Hubbard* and other kindred cases, the right which the appellee has under its respective leases is merely a license or a privilege to take water from the canal; the state is under no obligation or agreement to furnish water under said leases. Sections 5 and 6 of the Act of February 4, 1825, and Section 23 of the Act of March 23, 1840, refer in terms to a "privilege" to the use of the water. In each of the leases the so-called rights are termed "privileges" (as to the Law lease, Exhibit 1, Rec. 71; as to the Studer lease, Exhibit 3, Rec. 79; as to the Tryon lease, Exhibit 4, Rec. 83 and

86; as to the Maumee Paper Company lease, Exhibit 5, Rec. 89 and 90; as to the Detwiler lease, Exhibit 6, Rec. 99). This privilege, as is held in the cases above referred to, is subject to the right of the state to revoke; but in Ohio the state has an additional right by virtue of Section 2 of Article I of the Constitution of the State of Ohio, by which it is provided that no special privileges or immunities shall be granted that may not be altered, revoked, or repealed by the General Assembly (Appendix p. 11). This section was adopted in this form in 1851, and therefore applies to privileges granted to the appellee.

Respectfully submitted,

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APPENDIX

The Constitution of the State of Ohio:

"Article I.

Section 2. Right to alter, reform, or abolish government, and repeal special privileges. All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly."

IN THE

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No. 674, October Term, 1928

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Appellants,

vs.

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Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

BRIEF ON BEHALF OF APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 674, October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO, THE VILLAGE OF MAUMEE, OHIO, THE VILLAGE OF WATERVILLE, OHIO, AND THE CITY OF TOLEDO, OHIO,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLEE

I

STATEMENT OF THE CASE

A. NATURE OF CASE, COURT OPINION, AND JURISDICTION

This case is an appeal from the final decree (R. 185) on opinion of the District Court (R. 170), not officially reported, granting and entering a permanent injunction

in favor of appellee against appellant here, defendant below, Harry J. Kirk, as a state officer of Ohio, *viz.*, state highway director of that state, and against the other appellants here, defendants below, as proper but not necessary defendants, in a suit instituted by appellee in the District Court of the United States for the Southern District of Ohio, Eastern Division, at Columbus.

The purpose of the suit was, as shown by the allegations and prayer of the bill of complaint (R. 1), to secure, for appellee, a temporary restraining order, an interlocutory injunction and finally a permanent injunction suspending and enjoining enforcement, operation and execution of a statute of Ohio by restraining and enjoining the action of such state officer in the enforcement and execution of such statute, on the ground that the statute is unconstitutional, in that (a) it impairs the obligations of seven water and land granting, selling and leasing contracts between the State of Ohio and appellee under which appellee secured and has the right to use certain of Ohio's Miami and Erie Canal lands and to take water for hydraulic purposes from Ohio's Miami and Erie Canal, and that the Act deprives appellee of its property in such contracts without due process of law; (b) that it impairs the obligation of another certain contract entered into between the State of Ohio and the City of Toledo, Ohio, for the use and benefit of appellee, and it deprives appellee of its property in such contract without due process of law.

The Miami and Erie Canal (so named under an Act of March 14, 1849, 47 O. L. 44, Paragraph 30 Appendix to this brief, page 219) was one of a number of canals

projected, constructed and owned by the State of Ohio, and on completion thereof, in 1845, it extended from its connection with the Ohio River northerly through the cities of Cincinnati and Dayton, to the Mad River and on to and through the City of Defiance, in the northwestern part of Ohio, to the Maumee River; thence southwesterly to the west Ohio state line and northeasterly to a point a few miles northeasterly of Defiance where it entered the Maumee River, and that river was then used as the canal to the Village (unincorporated) of Providence, in Lucas County, Ohio. At that village the canal was connected with the Maumee River on the north bank thereof and extended northeasterly along the river through the villages of Waterville and Maumee and on, into and through the City of Toledo to Lake Erie, the villages named and Toledo being in Lucas County, Ohio. These canals were constructed by Ohio for two purposes, first, navigation, and second, developing hydraulic power wherever possible thereon and selling or leasing lands along and water from such canals, not needed for navigation, to private parties for hydraulic purposes. Navigation on the Miami and Erie Canal was abandoned practically thirty-five years ago, and prior, with one exception, to the making of appellee's contracts, the exception being a reservation and exception by a grantor of water in a perpetual grant of water to Ohio. On the south bank of the Maumee River opposite the Village of Providence is the Village of Grand Rapids, formerly Gilead, Wood County, Ohio. In the construction of this canal the state constructed and owns what is known as the Grand Rapids State Dam, extending from the north bank of the river at the Village of Providence southerly

across the river to the Village of Grand Rapids. The part of this canal in question here begins at its connection with the Maumee River above the Grand Rapids dam and extends on northeasterly along the river into the City of Toledo to its present northern terminus and outlet into Swan Creek. The water in the Maumee River and in this part of the canal runs northeasterly at all times. All water passing from the canal into Swan Creek goes on through the creek into the Maumee River and the Maumee River empties into Lake Erie.

This part of the canal is shown on a map, Stipulation Exhibit No. 25 (R. 169), and for the purposes of this case must be considered in two parts, which for convenience we designate Lineal Part 1 and Lineal Part 2. Lineal Part 1 is approximately eight and one-half miles long and extends from the outlet of the canal at its present northern terminus, southwesterly up the Maumee River through the Village of Maumee and to the Maumee side-cut, as shown on Stipulation Exhibit No. 25. Lineal Part 2 is approximately sixteen and one-half miles long and extends from the northeasterly side of the Maumee side-cut, i. e., from southwesterly end of Lineal Part 1 on southwesterly up the river to its connection with the river above the Grand Rapids State Dam. Within these two parts is a part known as the "Eighteen-Mile Level" extending from Lock 9 or Guard Lock, at Providence, northeasterly to Lock 45. (Stipulation Exhibit 25, Map; R. 169.)

The construction of the Miami and Erie Canal was authorized by the enabling Act of the General Assembly of Ohio passed February 4, 1825 (23 O. L. 50, Vol. 2, Chase's Statutes, page 1472), and certain parts of it

were by that Act ordered to be put under contract for construction. (Paragraph 6, Appendix, page 200.) This Act provided for the appointment by the General Assembly of a board of canal commissioners to carry on the construction of the canal and thereafter to administer the operation thereof.

By an Act passed February 11, 1828 (Vol. 3, Chase's Statutes, page 1598, Paragraph 11, Appendix, page 206), this board was given power to sell any water which in its opinion might be spared from any state canal or works connected therewith, without injury to navigation, for a term of years, in its discretion, to the person who should bid the highest annual rent therefor.

By an Act passed February 18, 1830 (Vol. 3, Chase's Statutes, page 1659, Paragraph 15, Appendix, page 208), express authority was given the canal commissioners to sell from time to time for hydraulic purposes, subject to such conditions and reservations as the commissioners might deem necessary and proper, either *in perpetuity* or for *a term of years*, for an annual rent *or otherwise*, as deemed for the best interests of the state, the surplus water in either of the canals of the state above the quantity required for purposes of navigation. Water passing around locks was included in the term "surplus water." This Act also gave the state power to sell lands for the same purposes. By the Act every lease, grant or conveyance of water was required to contain a reservation and condition whereby the state could at any time resume the privilege or right to the use of the water thus leased or sold in whole or in part when *deemed necessary* for the *purposes of navigation* or whenever its use for hydraulic purposes should be found in any

way to interfere with and injuriously affect the *navigation* of either of the canals. No other provision for the resumption of the water appears in the Act. These provisions, Sections 3 to 7 of this Act, were carried into the Act passed March 23, 1840 (38 O. L., 87 Swan's Statutes of Ohio, 1841, pages 174 to 200, Paragraph 27, Appendix, page 215), and in this latter Act became Sections 20 to 24, inclusive, without change except that the board of canal commissioners in this latter Act is designated as the board of public works.

Under these statutes and an Act of 1902, hereafter described, appellee acquired seven grants or contracts (Stipulation Exhibits Nos. 1 to 7, inclusive; R. 68, 74, 77, 82, 88, 95 and 101), securing to it the right to use certain Miami and Erie Canal lands and to take water from the Miami and Erie Canal at the Village of Maumee, Ohio, and use the same for hydraulic purposes in the operation of its hydro-electric plant situated just south of Lineal Part 1 of the canal as described above and on the northerly bank of the Maumee River. (See Stipulation Exhibit No. 25, R. 169.) By the express terms of one of these contracts, the supplementary lease hereinafter described, the State of Ohio agrees to let into this canal from the pool of the Maumee River above the Grand Rapids State Dam all the water that the canal will carry to its safe capacity down through Lineal Part 2 and through the southwesterly 1 6/10th miles of Lineal Part 1 to the water flume of appellee carrying appellee's portion of such water to its hydro-electric plant for operation of the plant in the generation of electricity for light, heat and power. Appellee's portion of such water is 422 cubic feet per second out of the 536 cubic feet per

second carried by the canal. (R. 164.) The difference between appellee's portion of 422 second feet and 536 second feet is used under two other leases for the purpose of operating a flour mill, Pilliod mill, at Providence, and The Toledo Grain & Milling Company mill at Toledo, one of these leases being Stipulation Exhibits 8 and 9, and the other being Stipulation Exhibit 10. (R. 104, 110 and 116.)

Under the terms of appellee's contracts no other contracts may be made for water in Lineal Parts 1 or 2 and there are no other contracts than the ones mentioned above. (Stipulation and Agreement, Sec. 17, R. 65.)

Appellee acquired its first and principal lease, known as the Law lease (Stipulation Exhibit No. 1, R. 68), September 11, 1900, through assignment from the original grantee, with consent of the board of public works. This lease, now running under a renewal term as hereinafter described, extends for a period of thirty years from March 12, 1925.

Appellee's other contracts extend throughout varying terms in the future except the James Purdy grant (R. 101) and the one known as the supplementary agreement and lease (Stipulation Exhibit No. 2, R. 74). This supplementary lease extends contemporaneously with the Law lease. The Purdy grant is a grant of water by Purdy to Ohio with reservation of water rights in perpetuity. These contracts will be more particularly hereinafter described.

The hydro-electric plant has a minimum value of over $200,000.00, and the water rights under the contracts have a minimum value in excess of $400,000.00 (Stipulation Exhibit No. 24, R. 165 to 168.)

All the water called for by the contracts must come from the pool of the Maumee River above the Grand Rapids dam down through Lineal Part 2 and on through the southwesterly 1 6/10ths miles of Lineal Part 1 of the canal to the hydro-electric plant. There is no other source from which water may be received for the operation of the plant, and without the construction of another plant, there is no other plant at which the water may be used. But such water may be so used with large profit to appellee throughout the terms of such contracts (R. 20).

Through an Act passed January 22, 1920 (108 O. L., Part 2, 1138-1141, Paragraph 37, Appendix, p. 230), the General Assembly declared the abandonment for both canal and hydraulic purposes

> ("subject, however, to the rights hereinafter under Sections 6 and 7 provided for")

of that portion of the canal described above as Lineal Part 1. By the same Act the City of Toledo was given an option to buy the abandoned portion, Lineal Part 1, at a price to be determined by a board of appraisement, subsequently fixed at $300,000.00, plus the additional consideration provided for in said Sections 6 and 7 of the Act. These two sections made provision for a deed to be given to the City of Toledo "conveying such property in fee simple to the City of Toledo," etc., "*but excepting therefrom and subject to the rights of owners of existing leases of either lands or water, or both, and the rights of such owners to a renewal of said existing leases.*"

Section 7 provides that "*in case the state's lessees are* at any time under the terms of this Act *deprived of*

their water privileges, the City of Toledo *shall pay such lessees a fair compensation for the loss of the water to which they are entitled,* and in case the amount of compensation cannot mutually be agreed upon, the City of Toledo shall proceed under the provisions of the General Code *to condemn the rights of such lessees* for the use of said municipality."

Toledo in pursuance of resolution Stipulation Exhibit 11 (R. 122) paid the state the $300,000.00 and received a deed (R. 133) which described the property conveyed, Lineal Part 1, and immediately after the description there followed the words, "excepting therefrom and subject to the rights of owners of existing leases of either lands or water, or both, and excepting therefrom and subject to the rights of such owners to a renewal of such existing leases." The *habendum* clause of the deed reads, "to have and to hold said premises as fully and completely and subject to all such conditions and restrictions as the State of Ohio might or should convey the said premises by virtue of the provisions of the aforesaid Act of the General Assembly of Ohio." At the time of this purchase by Toledo of Lineal Part 1 the city was aware of appellee's claimed water rights under its contracts here in question. (R. 61.) On September 10, 1923, Toledo, through ordinance, authorized its director of service to settle with appellee but no settlement was made. (Stipulation Exhibit 12, R. 124.) "Defiance Gas & Power Co." should have read, "The Maumee Valley Electric Co."

Since the conveyance by the state to Toledo of this property the city has refused to recognize any rights in appellee under its contracts and has refused to compen-

sate it for its rights thereunder, either by mutual agreement or by condemnation. On March 9, 1925, the council of the city, through formal resolution (R. 125), directed its director of public service at once to cut off the flow of the water in the canal at the southwesterly end of Lineal Part 1, at Maumee side-cut, and to construct the necessary bulkheads or other devices necessary to divert the flow of the water from the canal into the Maumee river through the Maumee side-cut. (See Stipulation Exhibit 25, R. 169.) This action would have totally destroyed appellee's water rights and rendered the hydro-electric plant valueless except as junk. (Stipulation Exhibit No. 24, R. 162, 165.)

On the passing of the above resolution, appellee instituted a suit in the District Court of the United States for the Northern District of Ohio, Western Division, at Toledo, and secured a temporary restraining order against such diversion by the city of the water. On final hearing the bill of complaint was dismissed (R. 137), but on appeal to the United States Circuit Court of Appeals for the Sixth Circuit the case was reversed (Decree, R. 138) and the Court of Appeals issued its mandate to the District Court directing that a permanent injunction be issued against the city enjoining it from interfering with the flow of the water in any respect until the city should pay appellee for its water rights under its contracts, either by mutual agreement or through condemnation proceedings. (Injunctive Decree on Mandate, R. 138.) The Court of Appeals in its opinion held that by the acceptance of the deed from the state for the property the city entered into a *contract* with the state for the *benefit* of appellee under which it was bound

either to pay appellee the compensation provided for in the act as construed by the Court of Appeals or permit the water to run to the hydro-electric plant according to the terms of the contracts.

(*Maumee Valley Electric Company vs. City of Toledo et al.*, 13 Fed. Second Series, 98-105.) The city petitioned for a writ of *certiorari* from this court but the writ was denied. (Case No. 554, October Term, 1926, U. S. Supreme Court.)

Instead of paying appellee for its water rights, Toledo and the other municipal defendants secured the introduction of and urged (R. 66 and 67) the passage of the Act attacked in this case, passed May 11, 1927. (112 O. L., pages 360 to 363, Paragraph 39 Appendix, page 236.) This Act declares an abandonment of Lineal Part 2 of the canal, both for canal and hydraulic purposes. It took effect on August 10, 1927. In Sections 4 and 5 the Act declares as follows:

> "Section 4: All leases heretofore granted to any person, firm or corporation for canal or hydraulic purposes on that part of the Miami and Erie canal described in Section 1 of this Act, shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done."
>
> "Section 5: The abandoned portion of said canal shall be under the supervision and control of the state highway director to be devoted to highway and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to and he shall within sixty days of the taking effect of this Act drain the water out of said abandoned portion and

> prevent the water of the Maumee river from flowing into or through said abandoned part of said canal."

Section 8 of the Act provides that until said highway shall be constructed and improved no portion of the land to be used as a highway according to the terms of the Act shall be leased for any purpose whatever,

> "but until the State of Ohio shall construct and improve said lands for a highway all municipal corporations through which said highway shall pass when completed and the commissioners of Lucas County, Ohio, shall be permitted to use said canal land for public purposes only, without compensation."

By Section 10 of the Act the county commissioners of Lucas county and the council or other legislative body of any municipality or township through which said abandoned canal passes are given the right to remove existing highway bridges crossing said abandoned portion and to fill up the canal at such places to a grade to be approved by the director of highways,

> "and the county commissioners of Lucas County are *authorized* to drain the water of said abandoned portion and to prevent the water from the river flowing into or through said abandoned part of said canal, but reserving all rights of the said State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadways not in conflict therewith."

"Section 1" referred to in Section 4 as quoted above describes Lineal Part 2 of the canal.

This Act was not passed because of any default on the part of appellee. It is admitted in the pleadings and

in the stipulation and agreement between the parties on the evidence that appellee has performed and still is performing all of its obligations and duties under its several contracts (R. 61).

Before the taking effect of the above Act and on July 29, 1927, appellee filed this suit and thereupon made application for a temporary restraining order as prayed for in the bill. (R. 23.) Such an order was granted by Hon. Benson W. Hough, district judge, and filed July 29, 1927, and bond given. (R. 24.) This order was extended by Judge Hough at ten-day periods to September 27, 1927. (R. 27, 28, 29.) In the meantime, application had been made for an interlocutory injunction as prayed for in the bill of complaint, and on September 24, 1927, such an order was filed by Hon. Maurice H. Donahue, circuit judge; Hon. Benson W. Hough, district judge, and Hon. D. C. Westenhaver, district judge, and bond given. (R. 179.)

The suit was so instituted against George F. Schlesinger as superintendent of public works and director of the department of highways and public works of the State of Ohio, and the other defendants. Schlesinger resigned and left office on June 15, 1928. Thereafter, on September 8, 1928, a motion was filed by appellee in the case for an order substituting Harry J. Kirk as defendant in the place of Schlesinger, Kirk having been appointed to succeed Schlesinger in the office. (R. 183.) Harry J. Kirk consented to the substitution and entered appearance in the cause, and an order of the court substituting him as such party defendant was filed on that day, September 8, 1928. (R. 183 and 184.)

The case was submitted on final hearing on April 14,

1928, before Judges Hon. Maurice H. Donahue, circuit judge, Hon. Benson W. Hough and Hon. Smith Hicklenlooper, district judges, as a court constituted under Section 266 of the Judicial Code, Section 380 of Title 28 of the new United States Code, on the bill of complaint (R. 1), the answers (R. 29), a stipulation and agreement between the parties on the evidence (R. 57), Stipulation Exhibits Nos. 1 to 25, inclusive (R. 68 to 169), and argument of counsel. Thereafter the judges filed their opinion and a final decree was entered as shown at the beginning of this statement.

The bill of complaint (R. 1), in addition to stating the facts set forth above and other detailed facts hereinafter set out shows that appellee is a corporation, incorporated, organized and existing since prior to the year 1900, under the laws of the State of Ohio, with its principal office and place of business at the City of Toledo, Ohio, of which city and state it is a citizen, residing in the Western Division of the Northern United States Judicial District of Ohio; that it was and is so incorporated, organized and existing for the purpose of generating electricity and supplying the same to the public for light, heat and power purposes and for the purpose of acquiring, owning and holding all property of any and all kinds necessary or proper to be used in conducting said business, including the acquirement and holding of leases and other contracts for water to be used in the generation of electricity through hydro-electric power plants and otherwise; that the then defendant, George F. Schlesinger, was the duly appointed, qualified and acting superintendent of public works and director of the department of highways of the State of Ohio, and, as such,

had jurisdiction over, control and management of the property in question and that he was a citizen of Ohio and a resident and inhabitant of the City of Columbus, Ohio, within the jurisdiction of the District Court for the Southern District of Ohio, Eastern Division. The succession of the appellant, Harry J. Kirk, to the office of highway director, succeeding said original defendant, George F. Schlesinger, is shown above. The Bill further contains the usual allegation that the matter in controversy in the suit exceeds, exclusive of interest and cost, the sum of three thousand ($3000.00) dollars, and arises under the Constitution of the United States of America.

It also alleges that the Act makes no provision whatever for the protection of appellee in the enjoyment of its rights and privileges under its contracts, nor does it make any provision whatever for compensation to appellee in case the state highway director should drain the water from the canal or prevent the water from flowing into or through said canal to said hydro-electric plant or elsewhere, as required by appellee's said agreements.

The Bill also shows that the Act in question attempts arbitrarily and without making any provision for compensation to be paid to appellee for its rights and privileges under its contracts or for the loss of its plant, to declare such contracts null, void and of no effect, without any fault and not because of any default on the part of the appellee, in failing to comply with the terms of such contracts; and it alleges that the director of highways, in pursuance of the direction of said Act, was threatening to, and, unless restrained by the court, would proceed immediately upon the taking effect of the Act on August 10, 1927, to drain the water out of the canal

and prevent any water from flowing therein for the uses of appellee under its contracts, and thus take away from appellee all of said water called for by them and totally deprive appellee of the same without compensating it in any wise, to its great loss in that behalf, and without making any provision in any wise for a continuance of the flow of water, or any part thereof, in said canal for the use of appellee.

These allegations of threats are admitted by the answer of the state highway director (R. 34, 35), and by the answers of the other defendants (R. 41, 48). Except as to parties the answers are all alike.

B. QUESTIONS INVOLVED

The ultimate general question involved is whether the abandonment Act of 1927 attacked in this case (Paragraph 39, Appendix, p. 236) is contrary to Section 10 of Article 1 of the Constitution of the United States and Section 1 of Article 14 of the amendments to that Constitution, or either of said sections, (a) as impairing the obligation of appellee's contracts, Stipulation Exhibits Numbers 1 to 7, inclusive (R. 68 to 101), and as depriving appellee of its property therein without due process of law; and, (b) as impairing the obligations of said contract entered into between the State of Ohio and the City of Toledo in behalf of and for the benefit of appellee and as depriving appellee of its property therein without due process of law. In answering this question with respect to said contracts, there is involved the question as to the *capacity*, public or private, in which the State of Ohio owns its Miami and Erie canal lands, and if it owns such lands in its private or proprietary relation or status,

then by what rules of law must the State of Ohio be held to be governed in dealing with other parties through and in the making of such contracts?

C. HOW THE QUESTIONS ARISE

The issues arise out of the bill of complaint (R. 1), the answers of the defendants (R. 29 to 50), and the stipulation and agreement between the parties on the evidence (R. 57 to 67), with the Stipulation Exhibits Nos. 1 to 25, inclusive (R. 68 to 169). The facts as set forth in the bill of complaint are either admitted by the answers and the stipulation and agreement or established by legislative Acts and uncontroverted testimony of witnesses, which testimony is set forth in Stipulation Exhibit No. 24 (R. 160 to 169), no evidence having been offered on the trial in behalf of the appellants other than that contained in the stipulation. The case, therefore, presents no issues of fact and involves only questions of law as applied to the admitted facts stated above herein and the additional admitted facts hereinafter set out as follows:

(1) Ohio's System of Public Canals

(a) Aside from the Miami and Erie Canal there was constructed contemporaneously with its construction the Ohio Canal, in the eastern part of the state, extending from Cleveland south through Akron and other cities to the Muskingum River, which river was then used as the canal south to the Ohio River.

Practically at the same time there were constructed in the south and central part of the state south of Col-

umbus, Ohio, the Walhonding Canal, Hocking Canal, Sandy and Beaver Canal. The above canals, together with the Muskingum Improvement and the Western Reserve and Maumee Road, made up what was known as the Public Works of Ohio, including various dams, side-cuts, feeders, reservoirs, lock-houses, collectors' offices and weigh-locks, as constructions or devices necessary in the operation of said canals. (Par. 31, Appendix, p. 219.)

(b) *Authority for Construction of Ohio's Canals:* Authority for the construction and operation of Ohio's canals springs from the Constitutions of the state and legislative enactments in pursuance thereof. The first Constitution of Ohio, 1802, contained no specific provision with respect to canals or other public works. By Section 1 of Article 1 of that Constitution the legislative power of the state was vested in a general assembly and the power for constructing the public works of the state, including its canals, was lodged in the general assembly by that provision. Under that Constitution the entire public works of the state were provided for and constructed and under it they were operated through laws passed by the general assembly until the Constitution of 1851 was adopted. The next Constitution was adopted in 1851 and the only express provisions therein with respect to public works were Sections 12 and 13 of Article 8. Section 12 provided that so long as the state should have public works requiring superintendence there should be a board of public works, consisting of three members, elected by the people, and Section 13 provided that the powers and duties of this board and its several members should be such as then were or might be

prescribed by law. (Par. 1, Appendix, p. 195.) September 3rd, 1912, Section 12 was amended, providing that there should be a superintendent of public works appointed by the governor, with powers and duties then exercised by the board of public works until otherwise provided by law. Section 13 above mentioned was repealed on the same date.

(c) *Purpose of Ohio's Canals*: To ascertain the purposes for which the canals of Ohio were constructed, we must look to the legislative provisions authorizing and directing their construction, operation and management; and to determine the present status of their ownership and control by the State of Ohio and the capacity in which the state now owns and for a long time has owned and controlled the lands formerly devoted in part to navigable canals, and to determine by what rules of law the state must be governed in dealing with its citizens with reference to these lands, we must look not only to those legislative provisions but also to the changed social and commercial conditions now confronting the state and her citizens. The legislative acts providing for the construction and operation of these canals began with the Act passed February 23, 1820, 18 O. L. 147, Volume 2, Chase's Statutes, 1131, and other Acts were subsequently passed by the general assembly from time to time down to the Act of February 28, 1843, 41 O. L. 43, this being the Act which directed the completion of all parts of the Miami Extension Canal not then under contract, from the Mad River at Dayton, Ohio, north to the City of Defiance. There were twenty-eight of these Acts. They are described and parts of them pertinent to the

questions here are quoted in full in paragraphs 2 to 29, inclusive, of the Appendix. (Pp. 197 to 219.) The first five of these Acts providing for the construction of the state's system of canals have often been referred to as the Primary Acts for such construction, but under that designation we would include the other Acts above referred to, providing for not only the construction of those canals but also for the management and operation thereof during and after construction.

Appellants claim that these canals were constructed only for the purposes of public navigation. While it may be conceded that these canals would not have been constructed for the purpose alone of furnishing hydraulic power and it may be admitted that navigation was the principal purpose of such construction, appellee claims that a great object of the general assembly in the construction was that of furnishing water to private persons, firms and corporations for hydraulic purposes.

The first Act mentioned above, and the second Act passed January 31, 1822, 20 O. L. 31, Vol. 2, Chase's Statutes, 1220, each declared in effect in a preamble that navigable communications by means of a canal or canals between Lake Erie and the Ohio River would greatly promote the agricultural, *manufacturing* and commercial interests of the people of Ohio. These two Acts and the third and fourth Acts provided for canal commissioners, who were directed to employ engineers and ascertain the practicability of canals through the following routes: (1) Sandusky Bay to the Ohio River; (2) Maumee River to the Ohio River; (3) Lake Erie to the Ohio River by sources of Cuyahoga, Black and Muskingum Rivers; and (4) from the lake by sources of Grand and Mahoning

Rivers to Ohio River. (Paragraphs 2 to 5, inclusive, Appendix, pp. 197 to 200.) The above Acts were complied with and reports were made from time to time to the General Assembly.

The fifth Act was passed February 4, 1825, 23 O. L. 50, Volume 2, Chase's Statutes, 1472, entitled,

> "An Act to Provide for The Internal Improvement of the State of Ohio By Navigable Canals."

This Act provided a board of canal commissioners of seven members to be appointed by the general assembly; authorized employment of agents, engineers and surveyors and authorized the commissioners to commence and prosecute making of a navigable canal on Muskingum and Scioto Route to Lake Erie, and also a navigable canal on so much of the Maumee and Miami line as lay between Cincinnati and Mad River at Dayton; and created a canal fund for construction and a board of "commissioners" of the canal fund, of three members to continue in office for six (6) years, prescribing their powers and duties in borrowing and disbursing funds.

> This Act, Section 5, appropriates and pledges: "• • • all the net proceeds of tolls collected on the canals herein described *and of the rents and profits of all works and privileges* connected with or appertaining to said canals and belonging to the state."

Section 6 of this Act provides that certain moneys pledged and appropriated by the Act,

> " • • • together with the net proceeds of all tolls *and of the rents and profits of all works and privileges* connected with said canals shall be paid into the state treasury and shall be kept distinct and apart from other moneys belonging to the state."

The above quotations from this Primary Act are here given as definite proof of the intention of the general assembly to utilize the canals for other purposes than navigation, *i. e.*, hydraulic power and other similar purposes. Section 8 of this Act gives the power of eminent domain to the canal commissioners to appropriate, take possession of and use any lands, waters, streams and materials necessary for the prosecution of the improvements intended by the Act; provides how such property should be paid for and enacts that,

> "The fee simple of the premises so appropriated shall be vested in this state." (Paragraph 6, Appendix, p. 200.)

Subsequently to the passage of the fifth Act just described above the general assembly, beginning with the Act passed February 7, 1826, Volume 3, Chase's Statutes, 1527, and ending with the Act passed March 7, 1842, 40 O. L. 72, passed numerous Acts through which the canal commissioners or the board of public works were authorized and directed, (1) to purchase or otherwise acquire lands on each and all of the state's canals at each and every point on or adjoining such canals where surplus water passing through them might be profitably used for hydraulic purposes; (2) to sell such lands and town lots as had been acquired or might thereafter be acquired for the benefit of the canal fund and not necessary for construction of the canal,

> "other than those which are situated at points or places on or adjoining the line of the Ohio canals where the surplus water produced by said canals can be advantageously used for hydraulic purposes";

(3) to sell, in their discretion, surplus water from the canals for a term of years to the person who would bid the highest annual rent therefor; (4) in their discretion to sell for hydraulic purposes surplus water from any of the canals, and also lands not needed in connection therewith, and not necessary for navigation; this power was to be exercised by the grantees subject to such conditions and reservations as the commissioners might consider necessary and proper either *in perpetuity* or for a *limited number of years* for a certain annual rent or *otherwise* as they might deem most beneficial for the interests of the state; (5) to purchase for and on behalf of the state any mill or mill site upon any feeder to either of the canals where a valuable hydraulic power might be created, providing the creation of such hydraulic power would injure such mill or mill site; and (6) made it the duty of the canal commissioners or board of public works to make selection of such lots of land as might be necessary to the proper use of any water power which might be created by the construction of the Miami and Erie Canal or any of the sections or parts thereof.

These Acts thus conferring power to make land and water leases for hydraulic purposes and requiring the retention and acquirement of hydraulic power sites along and on each of the canals and the feeders thereof and requiring the promotion of hydraulic power wherever possible on such canals through water to be taken therefrom, making money appropriations therefor and regulating the canals by protecting the water supply, are described and the pertinent provisions will be quoted in full in the argument.

The statutes mentioned and referred to above, and

which granted power to the board of canal commissioners, afterwards the board of public works, to make sales and grant leases of lands and water,

> "*in perpetuity* or for a *limited number of years* for a certain annual rent or *otherwise*,"

and upon such conditions and reservations as the commissioners or board might consider necessary and proper, continued in force without change from the time of their enactment in 1830 and re-enactment in 1840, down to the year 1917. These statutes were carried into the Revised Statutes of 1880 as Sections 7775 to 7779, respectively, and afterwards became without change Sections 14009 to 14013 of the General Code of 1910. Section 14009 of the General Code of 1910 was amended March 21, 1917, 107 O. L. 418, limiting such leases to a period of twenty-five years' duration. This amendment, however, was enacted long after all of appellee's contracts were written, i. e., about twenty years after the earliest one, the Law lease, was written and the same length of time after navigation had been abandoned.

In the stipulation and agreement between the parties on the evidence (R. 57) it is agreed that all the legislative Acts of the States of Ohio and Indiana and the Congressional Acts, general or special in any case, as listed on Stipulation Exhibit No. 23 (R. 154) and any other special or general legislative Act or resolution pertaining to the canals of Ohio, might be considered in evidence in the court below and in any reviewing court and that quotations might be made therefrom by counsel on either side in presentation of the case in any court.

Upon the beginning of the construction of the canals in Ohio and throughout such construction the canal com-

missioners and the board of public works in pursuance of the statutory authority described above, made sales and leases of water and lands along and upon all the canals of the state for hydraulic purposes contemporaneously with the construction of the various parts thereof. (Record 5 and 65.) This practice has continued to the present time and is still in force. Such water leases and sales alone have brought to the state from the Miami and Erie Canal the sum of nine million dollars and a like amount from the Ohio Canal. (R. 65.)

(d) *Leasing of the Entire Public Works of the State:* Leasing of the entire public works of the state to private individuals was effected in pursuance of an Act passed May 8, 1861, 58 O. L. 117, entitled,

> "An Act to Provide for the Leasing of the Public Works of the State."

The public works are named in this Act as the Miami and Erie Canal, Ohio Canal, Walhonding Canal, Hocking Canal, Sandy and Beaver Canal, Muskingum Improvement and the Western Reserve and Maumee Road and all side-cuts, feeders, reservoirs, lock-houses, collectors' offices, weigh-locks and leases of surplus water connected with the same or pertaining thereto and owned by the state for the purpose of being used in connection therewith. These were leased for a period of ten (10) years to five men, and the Act provides that all moneys derived from such leasing should be paid into the treasury of the state. The public works were taken over by these lessees and operated for the period of ten years.

Section 17 of this Act provided that nothing in the Act should preclude the state from granting permission to the City of Cincinnati to enter upon and improve as a

public highway and for sewerage purposes all or any part of the Miami and Erie Canal extending from east side of Broadway in said city to Ohio River, the state reserving such right.

On April 11, 1867, 64 O. L. 330, the General Assembly through joint resolution extended this lease for another period of ten years after June 1, 1871. Two and one-half years before the end of the extension the state took the public works back into its possession, except a part of the northerly end of the Miami and Erie Canal in Toledo, and a part at the southerly end of that canal in Cincinnati. These parts in Toledo and Cincinnati were abandoned to those cities respectively, as will be presently shown. (Paragraphs 31 and 43. Appendix, pp. 219 and 248.)

(e) *Abandonment of Parts of the Canal by Legislative Act*: Abandonment of certain portions of the Miami and Erie Canal is shown through paragraphs 32 to 39, inclusive, (Appendix, pp. 221 to 236) and certain of such abandonment Acts are set out in full in those paragraphs of the Appendix.

The first abandonment Act passed March 24, 1863, 60 O. L. 44, authorized the City of Cincinnati to enter upon and occupy that part of the Miami and Erie Canal as a public highway and for sewerage purposes extending from the east side of Broadway in that city to the Ohio River. (Paragraph 32, Appendix, p. 221.)

The second abandonment Act was passed March 26, 1864, 61 O. L. 74, and authorized the City of Toledo to occupy that part of the Miami and Erie Canal as a public highway and for sewerage and water purposes extending from the southerly bank of Swan Creek (the northern

terminus of Lineal Part 1) northerly to the mouth of the Maumee River. (Paragraph 33, Appendix, p. 223.)

In Sections 44, 45, 46, 49 and 50 of Stipulation Exhibit No. 23 (R. 150) are listed other Acts of abandonment. We do not set them out in the Appendix because, except as to property affected, canals south of Columbus, they are practically the same in terms as the two abandonment Acts above described. They do not affect parts of the Miami and Erie Canal, but in Sections 47 and 48 are listed two Acts, the third and fourth, abandoning the parts of Wabash and Erie Canal (Miami and Erie Canal), westerly from Defiance, Ohio, in Paulding County to west Ohio state line. (Paragraph 34, Appendix, p. 224.)

The fifth abandonment Act, passed January 22, 1920, 108 O. L. Part 2, 1138 to 1141, is entitled:

> "An Act to abandon a portion of the Miami and Erie Canal in Lucas County and to provide for the sale or lease of the same to the City of Toledo, Ohio."

This Act abandons by appropriate description what we have designated in this brief as Lineal Part 1 and is the Act through which was effected the contract between the State of Ohio and the City of Toledo for the benefit of appellee, hereinabove referred to. It is set out in full in paragraph 35, Appendix, page 225. It is the Act construed in the case of *The Maumee Valley Electric Company vs. The City of Toledo*, 13 Federal Reporter, 2nd Series, 98 to 105.

The sixth abandonment Act was passed March 25, 1925, 111 O. L. 208 to 214. It affects that portion of the Miami and Erie Canal between the cities of Defiance

and Middletown, Ohio, and provides for leasing portions of the same to cities, villages and other political subdivisions of the state and for granting of leases outside of municipalities. (Paragraph 36, Appendix, p. 230.)

The seventh abandonment Act, passed March 27, 1925, 111 O. L. 367 to 370, is entitled:

> "An Act to Abandon a Portion of the Miami and Erie Canal in Lucas County, Ohio, and to provide for the Sale of the Same to the County Commissioners of Lucas County, Ohio."

This Act covers and affects Lineal Part 2, as we have named it, of the Miami and Erie Canal, which is the same property covered and affected by the Act attacked in this case. It is the same, practically, in its terms and provisions as the Act construed in the case of *Maumee Valley Electric Company vs. The City of Toledo, supra.* The only real difference between the two Acts is as to the property covered and that in the first Act permission was given to the City of Toledo to buy Lineal Part 1 of the Miami and Erie Canal and in this Act permission was given to Lucas County Commissioners to buy Lineal Part 2 of that Canal. This Act is quoted in full in paragraph 37, Appendix (p. 230).

The eighth abandonment Act was passed April 21, 1927, 112 O. L. 388. It abandons for canal and hydraulic purposes that portion of the Miami and Erie Canal extending from the dam north of the City of Middletown to the present southerly terminus of that canal at St. Bernard, in the City of Cincinnati. (Paragraph 38, Appendix, page 236.)

The ninth and last Abandonment Act is the one in question in this case, passed May 11, 1927, 112 O. L. 360-363, entitled:

"An Act to Abandon a Portion of the Miami and Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to Repeal All Acts in Conflict Therewith."

This Act is quoted in full in paragraph 39, Appendix, (p. 236).

(f) *Abandonment of Navigation on Miami and Erie Canal*: Navigation on the Miami and Erie Canal was practically ended prior to the year 1894, and prior to the year 1900 it had entirely disappeared from all parts of that canal. It has never been revived. This is alleged in the bill of complaint and is admitted in the case. (R. 4, 5.) This canal therefore has been without navigation for practically thirty-five years because the public refused to use it for that purpose. Throughout all the time, however, from the beginning of its construction in 1825 down to the present time, over one hundred years, it has been operated by the state in furnishing hydraulic power, producing revenue to the state. (R. 64, 65).

2. Construction and Operation of Miami and Erie Canal

On March 2nd, 1827, the Congress of the United States granted to the State of Indiana (4 Statutes at Large 236) a tract of land to be sold by the State of Indiana for the purpose of aiding that state in constructing a navigable canal from the Wabash River in Indiana to Lake Erie in Ohio. (Paragraph 10, Appendix, p. 206.)

On May 24, 1828, the Congress of the United States donated to the State of Ohio (4 Statutes at Large, page 305) large tracts of land, authorizing Ohio to sell such lands and use the funds in extending the Miami Canal

from Dayton and the Mad River to Lake Erie. Thereafter the State of Indiana proposed to the State of Ohio that Indiana would transfer to Ohio that part of the lands granted by Congress to Indiana as lay within Ohio, if Ohio would build a canal from the west Ohio State Line northeasterly across northwestern Ohio to Lake Erie. The Congress consented to this transfer through an Act passed May 24, 1828 (4 Statutes at Large, 305) and on February 24, 1834, the General Assembly of Ohio by joint resolution accepted the conveyance from the State of Indiana. Appendix, Paragraphs 10 (p. 206), 12 (p. 206), 13 (p. 207), 16 (p. 209), 18 (p. 211), 19 (p. 212), 20 (p. 213).

The Miami and Erie Canal was constructed in three sections. The first section, known as Miami Canal, was authorized by the Act of February 4, 1825, Paragraph 6, Appendix (p. 200), and extended from the Ohio River northerly through Cincinnati and Dayton to the Mad River. The second section, completed in 1845, constructed from the Mad River northerly through the State of Ohio to the City of Defiance, was known as Miami Extension Canal and the construction was authorized and done in pursuance of Acts shown in Appendix, Paragraphs 14 (p. 207), 18 (p. 211), 23 (p. 214), 29 (p. 219).

The third section, completed in 1842 and known as Wabash and Erie Canal, was constructed by Ohio from the west Ohio state line northeasterly through the City of Defiance and thence on northeasterly along or in the Maumee River, as heretofore described, to and through the City of Toledo to Lake Erie. As heretofore indicated, the General Assembly on March 14, 1849, 47 Ohio Laws 44, enacted "that the Miami Canal, the Miami Extension

Canal and the Wabash and Erie Canal shall hereafter constitute one canal which shall be known and designated by the name of The Miami and Erie Canal."

That part of the Wabash and Erie Canal extending from the City of Defiance west to the west Ohio State Line was abandoned by Acts of the General Assembly April 12, 1888, 85 O. L. 207, and March 3, 1891, 88 O. L. 72, (Sections 47 and 48, Stipulation Exhibit No. 23, R. 159).

Referring to the map, Stipulation Exhibit No. 25 (R. 168), it is a true representation with respect to the location of lineal parts 1 and 2 of the canal and all other data noted thereon. At its northern terminus it ends and empties into Swan Creek, at which point is indicated on the map The Toledo Grain and Milling Company's mill. It extends southwesterly up along the Maumee River into the Village of Maumee, through Lock 45 and past the hydro-electric plant, designated Maumee Valley Electric Plant on the map; thence on southwesterly one and six-tenths (1.6) miles from said plant to the northeasterly edge of the Maumee side-cut, as shown on the map. This is the end of Lineal Part 1. Lineal Part 2 then extends on southwesterly up along the Maumee to Lock No. 9, otherwise known as Guard Lock or Lock 44. The distance from Lock 45 to Lock No. 9 or Guard Lock, is eighteen miles. There are no other locks or obstructions between Lock 9 and Lock 45 on this eighteen-mile level except bridges over the canal. Just above Lock 9 is located and indicated on the map what is known as Pilliod Mill, and about three-quarters of a mile farther up the river the canal, Lineal Part 2, connects with the river above Grand Rapids State Dam,

as shown on the map. Leading from the canal in the Village of Maumee, southerly, to the hydro-electric plant on the north bank of the Maumee River is shown the water flume through which water is drawn and carried down to the hydro-electric plant, this water at this point falling a distance of sixty feet from the surface of the canal to the water wheels in the plant. (Stipulation Exhibit No. 24, R. 163, 168). The amount of water thus supplied is four hundred and twenty-two (422) cubic feet per second, creating twenty-seven hundred (2700) horsepower. The electricity generating capacity of the plant is ten million (10,000,000) kilowatt hours per year, (Stipulation Exhibit No. 24, testimony of Dorsey and Ayers, R. 164, 168). Throughout the time from 1914 to 1924 it generated an average of approximately seven and three-quarter million kilowatt hours per year by water power, (Stipulation Exhibit No. 14, R. 131), and in the year previous to the institution of this suit it generated by water power something over nine million (9,000,000) kilowatt hours, all of which was sold to the public for heat, light and power purposes, (R. 133, and testimony of Mr. Crawford, Stipulation Exhibit No. 24, R. 162).

At the time of the construction of the part of the canal here in question in 1842, the State of Ohio as a means of furnishing water to it constructed a dam across the Maumee River at the location shown on the map, Stipulation Exhibit No. 25. (R. 168). It was reconstructed several years ago and is of reinforced concrete about one thousand (1,000) feet long across the river, twelve (12) feet high, and stores a pool of water of

about the width and depth of the dam for twenty miles up the river. (R. 3.)

All the water, 422 second feet, used in operating the hydro-electric plant at Maumee must be and is drawn from the pool in the river above the dam down through Lineal Part 2, which the Act attacked in this case seeks to abandon and close, and thence over and through the southwesterly one and six-tenth miles (1.6) of Lineal Part 1, to and through the water flume leading to the hydro-electric plant. Lineal Part 1 is the part of the canal purchased by the City of Toledo under the Act of January 22, 1920, Appendix, Paragraph 35, (p. 225). This water, therefore, passes through Lineal Part 2 owned by the State of Ohio and over the southwesterly one and six-tenths (1.6) miles of Lineal Part 1 owned by the City of Toledo, but purchased and so owned subject to the terms, provisions and conditions of the Act of January 22, 1920, as construed by the United States Circuit Court of Appeals for the Sixth Circuit, in *Maumee Valley Electric Company vs. Toledo*, 13 Federal, 2nd Series, 98 to 105.

The Act attacked in this case was passed May 11, 1927 (Appendix, Paragraph 39, p. 236), declaring an abandonment of Lineal Part 2 and attempting to repeal all acts in conflict therewith and to declare all water contracts null and void, including of course those of appellee. Prior to that, however, and on March 27, 1925, the General Assembly had passed an Act (Appendix, Paragraph 37, p. 230), also declaring an abandonment of said Lineal Part 2, and to provivde for the sale thereof to the County Commissioners of Lucas County, Ohio. This Act gave an option to the County Commissioners of

Lucas County to buy Lineal Part 2 but provided that if the County Commissioners should elect to buy they should take it and it would be conveyed through a deed from the state to such commissioners,

> "but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, including the rights of said owners to a renewal of their said existing leases and subject to all lawful claims for damages and compensation asserted by such lessees on account of the abandonment of said canal under the provisions of this Act, including claims of lessees who are now receiving water at points situate on that part of said canal" (Lineal Part 1) "which has heretofore been sold and conveyed to the City of Toledo under and pursuant to the provisions of House Bill No. 560 enacted by the General Assembly of Ohio on the 22nd day of January, 1920,"

this last mentioned Act in the quotation being the one under which Toledo bought Lineal Part 1 as described above (Appendix, Paragraph 35, page 225).

The Act providing for the sale of Lineal Part 2 to the Lucas County Commissioners provided that the Commissioners should pay a price therefor in cash to be thereafter determined by a board of appraisers appointed by the governor, and the Act required such appraisers in appraising it "to take into consideration in said appraisement the revenue that can be derived from the use of said canal for any purpose." It was appraised by such a board at seven hundred and seventy-five thousand dollars (R. 20). This Act, like the Act of January 22, 1920, under which Toledo bought Lineal Part 1, provided that if the county commissioners should ever take the water out of Lineal Part 2 they should pay all the state's lessees for all the water they were entitled to

under their existing leases on both Lineal Parts 1 and 2, and that a deed should not be made to the State of Ohio until such payment should be made. It also prescribes the procedure under which the price should be arrived at to be paid to the lessees.

The commissioners of Lucas County never exercised the option given them under the Act of March 27, 1925 (Appendix, Paragraph 37, page 230), to purchase Lineal Part 2 of the canal, and the Act in question and attacked in this case attempts in its Section 13 to repeal said Act of March 27, 1925. (Appendix, Paragraph 39, page 236.)

3. Appellee's Leases, Agreements and Grants

Appellee is the owner of the following seven contracts, some of them leasing to appellee certain canal lands, and each of them reserving, selling or leasing water to be taken through, over and from the parts of the canal in question here in the manner and for the uses already described: (Stipulation Exhibits Nos. 1 to 7, inclusive, R. 68 to 101.)

(a) *The Law, Trustee, Lease*: The Law lease (Stipulation Exhibit No. 1, R. 68) was acquired by appellee on September 11, 1900, through assignment thereof with consent of the board of public works, from Robert J. Law, trustee, original lessee in the lease and to whom it was made on March 12, 1895, running in its preliminary term for a period of thirty (30) years from and after that date. By the resolution of the board of public works giving its consent to the assignment of this lease to appellee it also gave consent to appellee to sublet any

of the rights and privileges secured by the lease to appellee. By its terms it grants

> "the use and occupation of all the surplus water of the Miami and Erie Canal between Providence and Toledo not needed for navigation or not now under lease,"

such water to be taken out of the level of said canal at Maumee (this is on Lineal Part 1) and be conveyed to the hydraulic works to be constructed by and at the expense of the lessee. This lease provides that the lessee should pay a yearly rent of five hundred dollars ($500.00) to Ohio for the water, the rent to be paid semi-annually on the first days of May and November each year during continuance of the lease. It requires lessee to build at his own expense the regulating weir of stone walls and plates of wood under plans to be furnished by the acting state commissioner or engineer; requires the lessee to keep such regulating weir constantly in good repair, free from all obstructions; requires the lessee to construct the head-race, tail-race and other works and devices connected with the use of the water thus leased. The lessee is designated second party to the agreement and the lease further provides as follows:

> "And the said party of the second part further agrees, during the continuance of this lease, to keep constantly in good order and repair the weir, head and tail-race, and *all other works and devices connected with the use of the water hereby leased*, so far as the same shall be necessary to secure the regular and uniform flow of water from the upper to the lower levels, and also to prevent any breach in the bank, the formation of a bar or other injury to the canal, or impediment to the navigation thereof; and if, nevertheless, any such breach, bar, or other injury or impediment should

occur in consequence of any of said works not being faithfully and substantially constructed, or being suffered to be out of repair, then said party of the second part shall, on being notified thereof by said acting commissioner, engineer, or other proper agent of the state, immediately repair said breach or other injury; or if such agent of the state shall cause the same to be done (which he is hereby authorized at his option to do), then said party of the second part shall pay to said agent all necessary expenses incurred in repairing such breach or other injury, on demand."

This lease has a reservation in the following words:

"And the party of the first part reserves the right to resume, at any time, the use of the water hereby leased, whenever the same shall become necessary for the *purposes* of *navigation*, and to continue the use thereof so long as the same shall be necessary for the *purpose aforesaid;* and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or of the whole thereof for so great a portion of the time as to defeat the object of this lease, by destroying the value of the privilege (which fact shall be determined by three judicious, disinterested freeholders, one to be chosen by the acting commissioner, or other authorized agent of the state, one by the party of the second part, and the third by the two thus chosen), then the party of the second part shall be from such time absolved from all further liabilities growing out of this agreement."

It also contains an express provision for its renewal in the following words:

"And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such an-

nual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valuable buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided, such buildings shall be erected on land belonging to the state, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease."

Upon the same conditions and subject to the same limitations and restrictions contained in the lease the state leased to the lessee, for the purposes of enabling him to use said water power, a piece of land lying between the canal and the hydro-electric plant in Maumee through which extends the water flume hereinabove mentioned.

The lease contains provisions providing for forfeiture if in any case the lessee should not perform the obligations put upon him by the terms thereof.

Upon the acquirement of this lease appellee acquired the land where the hydro-electric plant shown on Stipulation Exhibit No. 25 (R. 168) in Maumee is located and there constructed a small hydro-electric plant of about four hundred hydraulic horsepower. (Testimony, Mr. Crawford, Stipulation Exhibit No. 24, R. 161.)

On April 9, 1902, the General Assembly passed an Act declaring it to be the settled policy of the state that

the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands, from Cincinnati to Toledo, should be retained and maintained as a public canal, and the same policy was declared as to the northern division of the Ohio Canal from Cleveland to Dresden on the Muskingum River. (Appendix, Paragraph 42, page 246.) Section 2 of this Act declared that all boats built for use upon either of the above mentioned lines of canal for freight transportation should be paid for by the state if at any time in the future the state should abandon either or both of said lines, so as to make such boats useless for transportation purposes.

Section 3 declared that the water supplies, reservoirs, dams, feeders and adjacent lands thereto of the southern division of the Ohio Canal from Dresden Junction to Lockbourne and from Columbus to Portsmouth should be retained and maintained. The southern division of the Ohio Canal included the Hocking Canal lying between the canal running from Columbus to Portsmouth on the west and the Muskingum River on the east. These canals were connected as a system. Section 3 also provided that a commission to be appointed by the governor should investigate the condition of the southern division of the Ohio Canal and report its findings bearing on the question of the improvement and maintenance of that division and its future usefulness as a canal, and it provided that pending such report the southern division should be kept open for navigation.

Section 4 of this Act provides as follows:

> "Section 4. The said board of commissioners, together with the board of public works, shall within the present year investigate all present water rate contracts on the two lines of canal

mentioned in Section 1 and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future.

The board of commissioners and the board of public works shall also investigate the water rent contracts upon the lines of the canal mentioned in Section 3 and make a special report to the next General Assembly as to what extent the rates for water rent may be increased."

(b) *The Tryon Lease, Stipulation Exhibit No. 4* (R. 82):

After the passage of the above mentioned Act of 1902, appellee acquired the Tryon lease in 1904 through assignment from the original lessee and with consent of the board of public works. This lease will be hereafter more particularly described.

(c) *James Purdy Quit-claim Grant, Stipulation Exhibit No. 7* (R. 101), *and Section 4 of the Stipulation and Agreement on the Evidence* (R. 60):

Under this grant James Purdy on December 8, 1845, for the consideration set forth in the grant, released and quit-claimed to the State of Ohio his right and interest as riparian proprietor to the use of water in the Maumee River flowing over the "Grand Rapids" alongside of his property in and near the Town of Gilead, now Grand Rapids Village, in Wood County on the south side of the Maumee River, that is, so much of such water as the state might

> "choose to divert and lease for *hydraulic purposes*, provided that the said Purdy reserves and excepts from said conveyance and reserves to his own use so much of such water to be taken from the pool of the dam aforesaid through the canal

> herein described in any quantity he may desire during the season that the canal is not navigable until the water in the pool sinks to a level fifteen inches below the top of the dam at its present height in the north channel"

of the river, said water so reserved being sufficient to operate six pairs of 4½-foot mill stones, grinding each at the rate of 150 bushels of wheat per twenty-four hours, together with all machinery necessary in manufacturing flour, etc. The rights reserved and excepted by Purdy as shown by other parts of the grant, were reserved and excepted to himself and by the state granted to him and his heirs and assigns forever, and on April 27, 1910, appellee became the owner of the rights thus reserved and excepted under this grant. (R. 60.) Purdy had built a mill on the south side of the Maumee River at Grand Rapids, formerly Gilead, and had built his own mill race carrying water from the river above his dam down to his mill on the south bank of the river. This grant was executed between Purdy and the state in pursuance of a resolution passed by the General Assembly of Ohio on March 12, 1845, and specifically authorizing such settlement with him. (Appendix, Paragraph 40, page 241.)

Statement as to this quit-claim grant was by mistake omitted from the bill of complaint, and by Section 4 of the Stipulation and Agreement on the Evidence between the parties (R. 60) it was agreed that the facts set forth in Section 4 should be considered as a part of the bill of complaint without amending the same, and by Section 15 of the Stipulation and Agreement on the Evidence (R. 64) it is agreed that no water reserved by this grant has been taken out of the pool of the Maumee

River on the south side of that river from above Grand Rapids dam since appellee acquired the grant, but that all such reserved water has been and is being taken from the pool by appellee out of the river on the north side and carried through the canal to the hydro-electric plant in Maumee.

(d) *Agreement and Supplemental Lease:* In the month of December, 1910, in pursuance of the Act of 1830 and of Section 4 quoted above of the Act of 1902, the State of Ohio, through its board of public works, and appellee entered into an agreement supplemental to and modifying the Law lease (Stipulation Exhibit No. 2, R. 74). This agreement in its preamble recognizes the ownership by appellee of the Law lease; also that the service rendered under the terms of the Law lease was unsatisfactory and that the compensation named in the Law lease was inadequate for satisfactory service; that to increase the flow of water in the canal between Grand Rapids and the hydro-electric plant in Maumee, appellee had undertaken at its own expense to remove rock bars in the canal near Waterville and remove other obstructions from the canal on the eighteen-mile level between Grand Rapids and Lock 45, and to raise the banks of said canal in certain places; that appellee was willing to pay the expense of a proper patrol system from the Village of Grand Rapids to Lock 45 to prevent breaks in the banks, repair locks, remove logs, brush and other impediments to the free and even flow of the water; that appellee was willing to pay an increased rental for the use of water granted by the terms of the Law lease, provided a high water level should be maintained in said portion of the

canal. It is then mutually agreed between the state and the appellee that:

> "First, the state should let into the eighteen-mile level of the canal at Grand Rapids from the pool above waters of the Maumee River equal to the safe capacity of said canal for use for hydraulic purposes at the mill of appellee located near Maumee and to cause as large, steady and even flow of such waters as may be practicable.
>
> Second, that the state should require the superintendent of canals to appoint three patrolmen who should be paid for their services by appellee and who should be required to patrol the canal banks between Grand Rapids and Lock 45, to repair breaks in the canal banks, stop leaks, remove logs, brush and other impediments.
>
> Third, that the state 'does sell and lease unto the company all of the increased water passing over the weir of said company provided for by this agreement.'
>
> Fourth, that the company appellee agrees to maintain its weir at all times at the level at which the same is constructed or on the order of the board of public works at such level as said board might thereafter require.
>
> Fifth, the company agreed to complete the excavation of the rock bars in the canal near Waterville as well as remove all other obstructions on the eighteen-mile level and to raise the banks thereof with all possible diligence at its own proper expense.
>
> Sixth, the company agreed to pay the compensation of the three patrolmen to be appointed by the state.
>
> Seventh, the company agreed to pay the State of Ohio the sum of $1500.00 per year in addition to the $500.00 provided for in the Law lease, and to pay an additional $1500.00, making $3500.00 in all in case the amount of water specified in the 7th section should be furnished.

> Eighth, all payments except premium payments for uninterrupted service were to be made subject to all provisions specified in the Law lease.
>
> Ninth, the agreement was to continue until March 12, 1925, end of the preliminary term of the Law lease, unless sooner terminated by default on the part of the company, and it was provided that a cancellation of the Law lease should work a cancellation of all obligations under this supplementary agreement."

After the acquirement by appellee of the Law lease, the Tryon lease and the Purdy grant by assignment from the original owners thereof respectively, and after appellee had entered into the supplementary agreement direct with the State of Ohio, it immediately complied with the requirement of the supplementary agreement for improvement of the canal by appellee, and therein deepened and widened the canal from Grand Rapids to Lock 45, raised the banks, removed the rock bars, and in fact did all that the supplementary agreement required of it to do in improving this property. Appellee did this at its own expense and at a cost of $53,000.00. (Testimony, Mr. Crawford, Stipulation Exhibit No. 24, R. 160.)

(e) *The Studer, Maumee Paper Company and Detwiler Leases*: Thereafter appellee acquired the Studer lease on December 11, 1913, Stipulation Exhibit No. 3 (R. 77), the Maumee Paper Company lease, Stipulation Exhibit No. 5 (R. 88), the George K. Detwiler lease, Stipulation Exhibit No. 6 (R. 95), all with the consent of the state, and since then appellee has been operating all of said contracts as alleged in the bill of complaint in operating the hydro-electric plant at Maumee, gen-

erating electricity sold to the public for heat, light and power purposes. (Sections 4 and 5, Stipulation and Agreement on the Evidence, R. 60, 61.)

By Sections 4 and 5 of the Stipulation and Agreement on the Evidence it is agreed that throughout the time from the acquirement by appellee of each of said contracts, Stipulation Exhibits Nos. 1 to 7, inclusive, to the present time, appellee has paid all the rentals called for by said contracts and has performed each and all the obligations provided for in each of them for it to do and perform, including payment of rentals on the Law lease, Stipulation Exhibit No. 1, and the supplemental agreement, Stipulation Exhibit No. 2. The preliminary term of the Law lease and the supplementary agreement expired March 12, 1925, but the United States Circuit Court of Appeals in *Maumee Valley Electric Company vs. Toledo*, 13 Federal, 2nd Series, 98 to 105, held that each of these two leases were renewed for another period of thirty years under their terms and under the action appellee had taken to renew them. (Stipulation Exhibits Nos. 19, 20, 21, 22, R. 140 to 152.) The rentals called for under these leases have been paid by appellee and accepted by the state on the new term of thirty years since its beginning on March 12, 1925.

Contemporaneously with the performance by appellee of the work of improving the canal, i. e., the state's property, under the supplementary agreement at a cost of $53,000.00 appellee reconstructed and greatly enlarged the hydro-electric plant at Maumee, from its capacity of four hundred horsepower to twenty-seven hundred horsepower, enlarging the water flume leading from the canal southeasterly to the plant, including the neces-

sary iron pipe flumes under the River Road, running down to the plant with a fall of sixty-one feet, put in an auxiliary steam plant and an entirely new and greatly enlarged system of turbine water wheels and electric generators, thus bringing the water plant to an electricity generating capacity of ten million kilowatt hours per year, Stipulation Exhibit No. 24. (Testimony, Messrs. Crawford, Dorsey and Ayers, R. 160 to 169.)

The terms and conditions of the leases, Stipulation Exhibits Nos. 3 to 6, inclusive, are the same as the terms and conditions, as to provisions for maintenance of the canal, reservations and renewal rights, of the Law lease, Stipulation Exhibit No. 1, except as shown by the following:

"STIPULATION EXHIBIT No. 3

Thomas W. Studer Lease

This lease was entered into November 13, 1906, between State of Ohio, first party, by the board of public works, and Thomas W. Studer, lessee, second party.

The provisions, terms and conditions if this lease are the same as set forth above in the Law Trustee lease, except,

(a) It sells and leases to lessee for the term of thirty years from and after November 1, 1906, 2100 cubic feet of water per minute, estimated at 47 horsepower, to be used in a grist mill or electric power plant, or other machinery which may be approved by board of public works, said water to be taken out of the level of the Miami and Erie Canal, Waterville, Ohio, and be conveyed to the mills or other hydraulic works over a regulating weir constructed by and at expense of lessee.

(b) Lessee is to pay to state the yearly rent or sum of Four Hundred Fifty Dollars ($450.00), payable semi-annually on the first day of May and November of each year.

(c) This lease reserved to board of public works the right at any time to enter upon the premises leased to construct and put in a gauge for the purpose of measuring water leased in such manner and place as may be deemed advisable, but at the expense of lessee.

(d) This lease does not lease any land to lessee.

This lease, with consent of the state by resolution of its board of public works, was duly assigned and transferred to the plaintiff, The Maumee Valley Electric Company, on December 11, 1913."

"STIPULATION EXHIBIT No. 4
A. C. Tryon Lease

This lease was entered into April 8, 1903, between State of Ohio, first party, by its board of public works, and A. C. Tryon, lessee, second party.

The provisions, terms and conditions of this lease are the same as set forth above in the Law Trustee lease, except,

(a) It sells and leases to lessee for thirty years from and after May 1, 1903, the use and occupation of a water power in Maumee, Ohio, said privilege to consist in the use of the water to which Reynolds and Brown were entitled at their mill, the quantity being 2,050 cubic feet per minute, estimated at 58 horsepower, and said water to be used after passing the mill of Mitchell and Brown and the mill of The South Toledo Paper Company, and will be used at the third fall on the same race, and to be taken out of the level of said Miami and Erie Canal in Maumee, Ohio, and be conveyed to the mills or other hydraulic works over a regulating weir constructed by and at expense of lessee.

(b) Lessee agrees to pay the state a yearly rent or sum of Three Hundred Dollars ($300.00)

in advance in semi-annual installments on the first day of May and November of each year.

(c) This lease leases to lessee for the like period of thirty years under the terms and conditions of the lease, the same as for the water 'all the state land abutting the powers hereby leased and not included in the lease to the paper mill and below it on the side-cut in Maumee, Ohio, which belongs to the state, and lessee agrees to furnish at his own expense all further and necessary land that may be required for use of the power hereby leased, to enable lessee to use and enjoy the use of the water power hereby leased for the like term of thirty years from May 1, 1903.'

(d) This lease gives the board of public works the right to enter upon the premises leased to construct and put in a gauge to measure the water leased in such manner and place as the board may deem advisable, but at the expense of the lessee.

This lease, with consent of the state by resolution of its board of public works, was assigned and transferred to the plaintiff, The Maumee Valley Electric Company, on October 13, 1904."

"STIPULATION EXHIBIT No. 5
The Maumee Paper Company Lease

This lease was entered into April 8, 1903, between the State of Ohio, first party, by its board of public works, and The Maumee Paper Company, second party, lessee.

The provisions, terms and conditions of this lease are the same as those set forth above in the Law Trustee lease, except,

(a) It sells and leases to the lessee for the term of thirty years from and after May 1, 1903, the use and occupation of a water power in South Toledo to consist in the use of the water to which the mill next above is entitled, being 2050 cubic feet per minute, estimated at 52 horsepower, and be used after passing the mill above, and being the

second fall from the Miami and Erie Canal in South Toledo (Maumee) by way of the next mill above summit and be conveyed to the mills or other hydraulic works.

(b) Lessee, for the right of such use and occupation of such water, shall pay the state the yearly rent or sum of Four Hundred Dollars ($400.00) in advance, payable in semi-annual installments on the first day of May and November in each year.

(c) 'That said water will at all times return into the canal after being used for hydraulic purposes at some convenient and proper place to be designated thereafter by said board of public works, engineer or other authorized agent of the state on the level next below Lock No. . ., in such manner as not to carry deposit into the canal nor obstruct the navigation thereof.'

(d) This lease leases to the lessee 'for the term of thirty years from the first day of May, 1903, all the land adjoining and abutting the power hereby leased, and included in the lease to Stadden and Company and below them and on South Toledo side-cut, which belongs to the state, and lessee agrees to furnish at its own expense all further and necessary land that may be required for use of the power hereby leased to enable lessee to use and enjoy the water power hereby leased for the like term of thirty years from May 1, 1903.'

(e) This lease reserves to board of public works the right to construct and put in a gauge of such size as will measure the water leased in such place and manner as said board may deem advisable, but at the expense of lessee.

This lease, by consent of the board of public works by resolution of that board, was assigned and transferred to plaintiff, The Maumee Valley Electric Company, in the year 1912."

"STIPULATION EXHIBIT No. 6
George K. Detwiler Lease

This lease was entered into February 20, 1901, between State of Ohio, first party, by Frank A. Huffman, acting commissioner of board of public works, and George K. Detwiler, second party, lessee.

The provisions, terms and conditions of this lease are the same as those set forth above in the Law Trustee lease, except,

(a) It sells and leases to lessee for the term of thirty years from and after May 1, 1901, the use and occupation of such quantity of water, if used at the location of the water power formerly occupied by Robert A. Forsythe and later by Raynor Seagraves and Company, as will produce 40 horsepower, which quantity of water is estimated to be 833 cubic feet per minute over a fall of thirty-two feet, the water hereby leased to be taken out of the level of the Miami and Erie Canal next above the Miami Lock (Lock No. 45). At the above named location, or such other point as may be agreed upon by the parties herein named, or their assigns, and to be conveyed to the mills or hydraulic works from between two regulating weirs to be constructed by and at the expense of lessee.

(b) For the right to use and occupy said water, lessee is to pay the state the yearly rent or sum of Three Hundred Twenty Dollars ($320.00) in advance on the first day of May and November in each year.

(c) This lease does not grant to lessee a lease of any land, but requires lessee to furnish his own land on which to use the water leased as aforesaid without any claim for deduction of rent therefor to enable lessee to use and enjoy the water power leased for the like term of thirty years from May 1, 1901.

This lease was assigned to The Maumee Valley Electric Company on September 20, 1909, and

such assignment was approved by Frank P. Hamer, superintendent of public works of Ohio, on January 25, 1916."

When the above described contracts had been acquired by appellee, it then owned all of such contracts permitting the taking of water from the part of the Miami and Erie Canal in question here, on both Lineal Parts 1 and 2, excepting the Peter Minor contract, shown by Stipulation Exhibits 8 and 9 (R. 104 and 110), and The Toledo Grain & Milling Company lease, Stipulation Exhibit 10 (R. 116). The Peter Minor contract is a perpetual grant under which the Providence Mill Company operates the Pilliod mill at Providence, Lineal Part 2, just below the Grand Rapids State Dam, as shown on Stipulation Exhibit No. 25, map of the canal. The Toledo Grain & Milling Company lease is the lease under which that company takes water from the north end of Lineal Part 1 for the operation of its mill there located, as shown on Stipulation Exhibit No. 25 (R. 169). The Peter Minor contract was made September 1st, 1842, and it was readjusted in 1846. The Toledo Grain & Milling Company lease is a renewal of a lease which was granted prior to the execution and delivery of appellee's Law lease, Stipulation Exhibit No. 1 (R. 68).

Appellee's lease known as the Detwiler lease, Stipulation Exhibit No. 6, is a renewal of a lease granted prior to the granting of the Law lease. The Law lease, Stipulation Exhibit No. 1, sold and leased to Robert J. Law, Trustee, for the term of thirty (30) years from and after the 12th day of March, 1895, subject to the restrictions, limitations and conditions therein contained, the *use* and *occupation* of all the water of the Miami and Erie Canal

between Providence and Toledo not needed for navigation or not now *under lease*. From the reading of the Studer lease, Stipulation Exhibit No. 3, the Tryon lease, Stipulation Exhibit No. 4, the Maumee Paper Company lease, Stipulation Exhibit No. 5, it appears that there were other leases on this part of the canal in existence at the time the Law lease was taken and that these three leases last mentioned above succeeded those leases.

II

SUMMARY

A. POINTS OF FACT

1. Federal Jurisdiction

Federal jurisdiction in the court below has not been disputed in this case, but from the facts stated above and the statement of facts hereinafter set out in the successive "Points of Fact" under this summary, all of which are shown by the bill of complaint, the jurisdiction in the court below clearly appears.

2. Authority for and Purposes of Construction and Operation of Miami and Erie Canal

Ohio's public canals, including the Miami and Erie Canal, which was a canal not connected with the others, and the particular part thereof in question in this case, shown by Stipulation Exhibit No. 25, map (R. 169), were constructed under the first Constitution of Ohio, 1802, and in pursuance of enabling Acts passed by the General Assembly of the state under that Constitution, and they,

including the Miami and Erie Canal and the part thereof in question here, were constructed for two purposes, *viz.*, public navigation and the furnishing of lands and water to private parties to be used for hydraulic power and other industrial and commercial purposes.

3. Navigation Abandoned on Miami and Erie Canal

It is alleged in the bill of complaint, Section 3 (R. 4, 5), that navigation on the Miami and Erie Canal had practically disappeared prior to the year 1894; that thereafter and before the year 1900 navigation had entirely ceased because of the failure and refusal of the public to use the canal for such purpose and that navigation has not since been revived. This allegation is admitted in the answer of the state highway director, Section 3 (R. 30).

The construction of the Miami and Erie Canal was completed in the year 1845 (R. 4, 30). The decline of navigation began prior to the year 1861.

4. When Appellee's Water and Land Contracts Written and Acquired

All of appellee's contracts, except the James Purdy grant (Stipulation Exhibit 7, R. 101), were written and all of them were acquired after navigation on the Miami and Erie Canal, including the part in question here, referred to as Lineal Parts 1 and 2, had been abandoned by reason of the refusal of the public longer to use that waterway for the purpose of navigation. The Purdy grant was written on December 8, 1845, and through it he quit-claimed to Ohio for hydraulic purposes the right

to take such water as he was entitled to take from the south side of the Maumee River at Gilead, now Grand Rapids, Wood County, Ohio, by reason of his riparian ownership on the river there, he reserving and excepting, however, therefrom to himself, his heirs and assigns forever, the amount of water specifically described in the grant. Appellee is the owner of the rights thus reserved and excepted by Purdy to himself, his heirs and assigns. (R. 60.)

5. Facts Upon Which Appellee Relied and Acted in Acquiring Its Contracts, Building Its Plant, and Its Business.

Appellee and the State of Ohio through the supplementary lease devised and perfected a plan under which all of the lands, including Lineal Part 2 and Lineal Part 1 to Lock 45, and the water, the use of which is called for by appellee's seven contracts, were and are to be devoted to the establishment and use of a great water power at Maumee, Ohio, all the water thus called for, four hundred and twenty-two second feet, to be drawn from the pool of the river above the State Dam at Providence down, over and through Lineal Part 2 and the southwesterly one and six-tenths miles of Lineal Part 1 of the Miami and Erie Canal, as a right of way, to the hydro-electric plant, and to be there used in operating that plant, generating electricity for light, heat and power. From the facts above and hereinafter stated no other inference can be drawn.

Appellee in acquiring said contracts and working out said plan relied,

(a) On the fact that navigation on the Miami and Erie Canal had been practically ended prior to the year 1894, thirty-five years ago, and was entirely gone before it acquired its principal lease, the Law lease, with express consent and permission from the State of Ohio, on September 11, 1900, that lease having been written on March 12, 1895, for a period of thirty (30) years thereafter, and having written in it an absolute right of renewal for another thirty (30) years if appellee should pay such a price as any other person might bid for it. If no such other bid should be received then this lease by its terms was to stand renewed in appellee on the terms thereof as originally written. (Stipulation Exhibit No. 1, R. 72.)

(b) On the statute passed February 11, 1828 (Appendix, Paragraph 11, page 206), expressly giving the board of public works power to sell from any canal for a term of years, in their discretion, water not needed for navigation, such sale to be to the person who would bid the highest annual rent therefor.

(c) On the statutes of February 18, 1830, Sections 3 to 7 (Appendix, Paragraph 15, page 208), re-enacted as the statute of March 23, 1840, Sections 20 to 24, inclusive (Paragraph 27, Appendix, page 215), by which statutes the canal commissioners and board of public works were given power to sell or lease water from any of the canals, and the lands along the same, for hydraulic purposes if such waters or lands were not needed for navigation, this power being given to such boards to be exercised by the lessee or grantee subject to such conditions and reservations as the board might consider necessary and proper, either in *perpetuity* or for a limited *number*

of years for a certain annual rent *or otherwise* as the board might deem most beneficial for the interests of the state, such statutes standing unchanged to the year 1917 and then amended only by limiting the leasing term to twenty-five years.

(d) The constant and continued practice of the canal commissioners and the board of public works in accepting such grants and other contracts relative to lands and waters along and from each of the canals wherever water power could be developed, from the beginning of the construction of such canals in any and all their respective parts (Stipulation and Agreement of the Evidence, Section 16, R. 65) down to the consummation of the plan above described.

(e) Particularly the Act of April 9, 1902, 95 O. L. 118-120 (Appendix, Paragraph 42, page 246). This Act in Section 1 declared it to be the policy of the state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, should be retained and maintained as a public canal and the same policy was declared as to the northern division of the Ohio Canal.

Section 3 of this Act, among other things, provided that a commission, to be appointed by the governor, should investigate the condition of the southern division of the Ohio Canal, being the Muskingum River improvement end, and from Dresden Junction to Lockbourne and from Columbus south to Portsmouth on Ohio River, obtain all the facts bearing upon the question of its improvement, maintenance and its present and future usefulness as a canal and report the same, together with recommendations, to the next General Assembly, pend-

ing which report this division (which included the Hocking Canal) should be kept open for navigation.

Section 4 of this Act expressly authorized and directed the canal commissioners and the board of public works to

> "investigate all present water rate contracts on the two lines of canal mentioned in Section 1 and *revise and readjust* them upon a *fair* and *equitable basis* as to the rents *to be paid* in the *future*."

The two lines of canal mentioned in said Section 1 were the Miami and Erie Canal, and the northern division of the Ohio Canal from Cleveland *to* Dresden on the Muskingum River. This Section 4 also directed the commissioners and board of public works to investigate the water rent contracts upon the lines of the canal mentioned in Section 3 and make a special *report* to the next General Assembly as to what extent rates for water rent might be increased. As showing that appellee relied upon the above facts, see Stipulation Exhibit No. 24, testimony of Mr. Crawford, president of appellee (R. 161).

6. What Appellee Has Done Relying on the Above Facts

(a) Relying upon the above facts appellee, upon acquiring the Law lease, September 11, 1900, acquired a valuable piece of land on the banks of the Maumee River at Maumee and constructed thereon a hydro-electric plant of four hundred horsepower, this being the location of the plant at the present time as shown on Stipulation Exhibit No. 25, Map (R. 63, 161).

(b) After the passage of the Act of April 9, 1902, appellee acquired, with the consent of the state, the Purdy grant and all the contracts for water and land on

Lineal Parts 1 and 2, except the grant under which the Pilliod mill is operated and the lease under which The Toledo Grain & Milling Company mill is operated, the contracts so acquired being Stipulation Exhibits Nos. 3 to 7, inclusive (R. 9 to 12 and 161).

(c) In December of 1910, in pursuance of said statutes and particularly the Act of 1902 (R. 161), appellee and the state, through the board of public works, entered into the agreement supplementary to and modifying the Law lease, Stipulation Exhibit No. 2 (R. 74).

Under the Law lease the original lessee, and afterwards appellee, as assignee thereof, became obligated to bear at its own expense all the cost of the maintenance of this canal from where it connects with the Maumee River above the Grand Rapids Dam to Toledo, including all works and devices connected therewith, which of course includes the Grand Rapids Dam (R. 70, 71). The same provisions with respect to the maintenance of the canal at the expense of appellee are contained in each of the other contracts acquired by appellee through assignment as aforesaid, except the Purdy grant.

Under the agreement supplementary to the Law lease made direct between the state and appellee, appellee assumed the obligation of complete maintenance of the canal from its connection with the Maumee River northeasterly to Lock 45, three-quarters of a mile northeasterly from the hyro-electric plant. In this agreement appellee also assumes the obligation of paying the wages of three patrolmen to be appointed by the state for the purpose of patrolling this canal, to prevent and to repair breaches in the banks of the canal, and to do any other matter or thing necessary to keep the canal in

good repair. In addition to the above appellee assumed in this supplementary lease an obligation to deepen and widen the canal, through excavation, permanently improve the state's property, from the Maumee River to Lock 45, remove all rock bars and other obstructions throughout the same and to raise the banks thereof. Appellee immediately complied with this provision, dredged the canal, deepening it and widening it and raising the banks thereof at a cost to appellee for this work alone of ($53,000.00) fifty-three thousand dollars. (Testimony of Crawford, R. 161.) In addition to the above appellee in this agreement agreed to pay and has paid a largely increased rental, namely, fifteen hundred dollars per year in addition to the five hundred dollars called for by the Law lease, and agreed to pay a further sum of fifteen hundred dollars per year if water should be supplied by the state through the canal to the additional amount stipulated in the supplementary agreement.

Aside from all of the above it assumed the payment and has paid all the rentals called for by the Tryon, Studer, Maumee Paper Company and Detwiler leases, Stipulation Exhibits 3 to 6 (R. 77 to 88).

(d) Upon acquirement by appellee of the supplementary agreement in December, 1910, appellee increased the capacity of the water flume leading from Lineal Part 1 of the canal in Maumee easterly to the River Road above the hydro-electric plant, from a small headrace accommodating the initial power plant of 400 horsepower to a great flume about 400 feet long, 50 feet across the top, 40 feet across the bottom, and 12 feet deep, and put in place from the west side of the River Road three large iron tube flumes to carry the water under the River

Road down to the water wheels at the plant, a fall of 61 feet. Appellee also at that time greatly enlarged the plant by installing new and modern water turbine wheels, electricity generators and an auxiliary steam plant to assist the water plant through possible dry seasons of the year. The water or hydraulic part of this plant was increased from its former capacity of 400 horsepower to 2700 horsepower capable of generating (10,000,000) ten million kilowatt hours of electricity per year. Stipulation Exhibit 24, testimony of Crawford, Dorsey and Ayers (R. 63 and 161 to 168).

7. Renewal of the Law Lease and the Supplementary Lease

The Law lease was granted for a period of thirty years beginning March 12, 1895, and running to March 12, 1925 (R. 68). The supplementary agreement was given in December, 1910, to run contemporaneously with the Law lease (R. 74). The Law lease contains a provision for its renewal for a second period of thirty years beginning March 12, 1925 (R. 72).

This renewal clause provides that the lease should stand renewed in appellee for such second period if appellee would pay any additional rent that any other party might bid therefor and that if no such bid should be received then said lease should stand renewed in appellee on its present terms. No such bid was received.

This same renewal clause is contained in each of the leases, Studer, Tryon, Maumee Paper Company and Detwiler (R. 80, 86, 92, 99). Neither of these four last mentioned leases has expired in its primary term. Such ex-

pirations *will occur one in* 1931, *two in* 1933 and one in 1936. The Purdy grant is a perpetual grant.

On August 7, 1924, previous to expiration of the primary term of the Law lease, appellee made application for renewal of all the above mentioned leases and agreements except the Purdy grant, Stipulation Exhibit No. 19 (R. 140), and took the other proceedings as shown by Stipulation Exhibits Nos. 20 to 22, inclusive (R. 141 to 154).

It is alleged in the bill of complaint, admitted in the answer and agreed in the Stipulation and Agreement on the Evidence (R. 12 and 61) that appellee has performed all the obligations of its contracts put upon it by the terms thereof and that it has paid to the state and the state has accepted such performance from appellee, including payment of all the rentals called for by the Law lease and the supplementary agreement, since the beginning of the renewal period of thirty years now running. The Law lease and the supplementary lease stand renewed for thirty years beginning March 12, 1925.

8. The State Entered Into a Contract With Toledo for Benefit of Appellee

In pursuance of the Act passed January 22, 1920 (Appendix, Paragraph 35, page 225), the City of Toledo purchased Lineal Part 1 of the canal and in that transaction the State of Ohio and Toledo entered into a contract for the use and benefit of appellee providing and stipulating that Toledo should not take the water out of Lineal Part 1, on which the hydro-electric plant is located, nor in any way deprive appellee of the use of

the water called for by its contracts until Toledo should pay appellee a fair compensation for such water and water rights under said contracts. Toledo by decree entered on the mandate of the United States Circuit Court of Appeals is permanently enjoined from taking the water out of Lineal Part 1 and from interfering with its flow in any wise until such compensation shall be made, thus securing to appellee a complete remedy for compensation for loss of its water rights under said contracts. (R. 138, Decree on Mandate.)

If the state highway director should be allowed to carry out the commands of the Act in question and attacked in this case, the water would then be drained from, and the water from the Maumee River be prevented from entering Lineal Part 2 of the canal. This action would totally deprive appellee of all the water called for by its contracts and all its rights thereunder and destroy the hydro-electric pant without compensation of any kind to appellee just as effectually as if it were diverted at the southwesterly end of Lineal Part 1 into the Maumee River.

9. The State by Subsequent Legislative Acts Confirmed Appellee's Contracts

Appellee's contracts were, through legislation enacted by the law making body of Ohio, recognized, ratified and confirmed not only by Section 4 of the Act of 1902 (Appendix, Paragraph 42, page 246) and by the Act of January 22, 1920, under which Toledo bought Lineal Part 1 (Appendix, Paragraph 35, page 225), but they were again recognized, ratified and confirmed by the Act of March 27, 1925 (Appendix, Paragraph 37, page

230). This latter Act declared an abandonment for both canal and hydraulic purposes of Lineal Part 2 of the canal in question here. It gave the commissioners of Lucas County an option to buy Lineal Part 2 at a price to be fixed by a board of appraisers appointed by the governor plus a fair compensation to be paid by such county commissioners to the state's lessees of either lands or water or both under their existing leases, including the rights of said owners to a renewal of said existing leases, for the loss of the rights of such lessees under such leases because of the execution of the Act. (See Sections 1, 4, 5, 6 and 8 of the Act, Appendix, Paragraph 37, page 230.)

B. POINTS OF LAW

1. **The United States District Court for the Southern District of Ohio, Eastern Division, Had Jurisdiction of This Case.**

2. **Appellee's Law Lease, Stipulation Exhibit No. 1 (R. 68) as Modified by the Supplementary Agreement, Stipulation Exhibit No. 2 (R. 74) Was Renewed for a Second Period of Thirty Years Beginning March 12, 1925, and Extending to March 12, 1955.**

3. **Appellee's Seven Contracts Existing Between It and the State of Ohio Were Entered Into and Carried on by Ohio in Its Proprietary or Private Capacity Through Its State Board of Public Works Thereunto Duly Authorized by Law and the Contract Entered Into by Ohio Direct with the City of Toledo**

Through Legislative Enactment, for the Use and Benefit of Appellee Was Made and Entered Into by Ohio in Its Proprietary or Private Capacity. Each of These Two Classes of Contracts Is Within the Protection of Section 10 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to that Constitution.

4. **The Act in Question Here Passed May 11, 1927, (Appendix, Paragraph 39, p. 236) Shows on Its Face That There Is No Intention on the Part of the State Itself Ever to Devote These Canal Lands, Lineal Part 2, to Highway Purposes, But That on the Contrary It Is an Act Designed Particularly to Turn This Property, Which Belongs to All the Citizens of Ohio, Over to the Political Subdivisions of Lucas County and the Townships and Municipalities Along the Line of Such Lands Without Any Consideration Moving From Such Subdivisions.**

The four points of law set forth above will be discussed in their order in the argument.

III

ARGUMENT AND AUTHORITIES

1. **The United States District Court for the Southern District of Ohio, Eastern Division, Had Jurisdiction of This Case.**

Jurisdiction in the court below to entertain this case has never been disputed. The bill of complaint (R. 1)

shows that the appellee, plaintiff below, is a corporation organized under the laws of Ohio with its principal office and place of business at Toledo in the Western Division of the Northern United States Judicial District of that state; that it was so organized prior to the year 1900 for the purpose of generating electricity and supplying the same to the public for light, heat and power purposes and for the purpose of acquiring, owning and holding all property of any and all kinds necessary or proper to be used in conducting said business, including the acquirement and holding of leases and other contracts for water and lands to be used in the generation of such electricity through hydro-electric power plants and otherwise; that the defendant state highway director of Ohio was a citizen of Ohio resident in the Eastern Division of the Southern United States Judicial District of that state at Columbus; and that the matter in controversy in the suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) and arises under the Constitution of the United States of America. The other facts set forth above in the statement of the case are shown in the bill of complaint.

The instant case is parallel with and the jurisdiction is sustained under the ruling of this court in *Cuyahoga River Power Company, Appellant, vs. City of Akron, Appellee*, 240 U. S. 462; 60 L. Ed. 743.

Ohio Public S. Company vs. State, 274 U. S. 12, 13, 14; 71 L. Ed. 898.

2. Appellee's Law Lease, Stipulation Exhibit No. 1 (R. 68) as Modified by the Supplementary Agreement, Stipulation Exhibit No. 2 (R. 74) Was Renewed For a Second Period of Thirty Years Beginning March 12, 1925, and Extending to March 12, 1955.

The Law lease was executed and delivered by the State of Ohio through its board of public works to the original lessee, Robert J. Law, under date of March 12, 1895, to run for a primary period of thirty years beginning on that date and ending on March 12, 1925. It was acquired by appellee through assignment from the original lessee with consent of the board of public works through resolution duly adopted by that board on September 11, 1900. It grants to the lessee

> "the use and occupation of all the surplus water of the Miami and Erie Canal between Providence and Toledo not needed for navigation or not now under lease."

It also grants to the lessee the use and occupation of certain lands lying between Lineal Part 1 of the canal and the hydro-electric plant as described in the last paragraph of the lease.

This lease contains a renewal clause for a second period of thirty years, copy of which renewal clause is as follows:

> "And it is further understood and agreed, that at the expiration of this agreement the party of the second part shall be entitled to a renewal of the lease, for a like term of years, for such annual rent as may be offered by the highest responsible bidder, who shall also agree to purchase of said party of the second part, all permanent and valu-

able buildings necessarily erected by said party for the convenient use of the water power hereby leased, at such price as such buildings shall be adjudged to be worth by three judicious, disinterested freeholders, to be chosen as hereinbefore specified; provided, such buildings shall be erected on land belonging to the state, or land which can be purchased by said bidder at a reasonable price, to be determined by said appraisers. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, said party shall be entitled to such renewal on the terms of this lease."

The supplementary agreement, Stipulation Exhibit No. 2 (R. 74), was entered into between the State of Ohio and appellee in December of 1910.

By paragraphs 4 and 5 of the Stipulation and Agreement on the Evidence (R. 60, 61), it is agreed between the parties that appellee is the owner of all the contracts, copies of which are Stipulation Exhibits Nos. 1 to 7, inclusive (R. 68 to 101); that it acquired them respectively at the times as set forth in the bill of complaint, and in said paragraph 4 just mentioned and that from the time of appellee's acquirement thereof, respectively, it has paid all rentals provided for appellee to pay in each of said contracts; that such payments have been accepted by the State of Ohio and that appellee has throughout the time of its ownership of said contracts, respectively, performed each and all of the obligations stipulated in each of them for appellee to perform, and this includes an agreement in paragraph 5 of the Stipulation and Agreement on the Evidence that *appellee has paid to the state, and the state has accepted from appellee, the same payments under said Law lease*

and said supplementary lease since the expiration of their primary terms on March 12, 1925, as had been paid under those leases prior to that time and as called for in each of them respectively *down to the present time*. It is alleged in the bill of complaint and admitted by the answers that appellee is able and desires to continue the payments of all the rentals called for by each of said contracts and perform all the other obligations provided for in each of them for it to perform unto the end of the leasing terms specified in each of them respectively and any renewal terms provided for in each of them respectively, if renewed.

So far as defendant the City of Toledo is concerned, the question of the renewal of the Law lease and the agreement and lease supplementary thereto was settled, and they were held to be renewed for another period of thirty years from March 12, 1925, in the case of *The Maumee Valley Electric Company vs. The City of Toledo*, 13 Fed. Rep., 2d Series, pages 98 to 105. No state officer was a party to that case, but the same facts are now admitted and stipulated with reference to such renewal in this case as were admitted and stipulated in that case.

It is agreed in paragraph 6 of the Stipulation and Agreement on the Evidence that the appellee filed its application with the director of highways and public works and superintendent of public works at Columbus, on August 7, 1924, prior to the expiration of the primary term named in those leases of March 12, 1925, for a renewal of all its said contracts, namely, the Law, Supplemental, Studer, Tryon, Maumee Paper Company and Detwiler leases, Stipulation Exhibits Nos. 1 to 6,

inclusive, and that Stipulation Exhibit No. 19 is a copy of that application (R. 140).

It is also agreed in paragraph 11 of the Stipulation and Agreement on the Evidence that appellee gave a written notice to the governor of Ohio and to the director of highways and public works and superintendent of public works at Columbus and took the court proceedings set out in said paragraph 11 as to appellee's election to take a renewal and preserve it of said Law lease and the agreement and lease supplementary thereto. (See Stipulation Exhibits Nos. 20, 21 and 22, R. 141 to 152.)

It would seem to be unnecessary to comment further upon the question of the renewal of these two leases except to cite in support of our contention the case of *The Maumee Valley Electric Company vs. The City of Toledo et al.*, 13 Fed. Rep., 2d Series, 98 to 105, inclusive, but we have made an examination of the authorities on the question of renewal of leases, and on that question we submit the following:

Even without the right of renewal expressly set forth in the lease, the holding over by the appellee after the expiration of the lease creates a tenancy upon the same terms and subject to the same covenants as those contained in an expired lease.

Black vs. LaPorte, 271 Fed. 620, and cases cited.

But in the case at bar the lease contained an express privilege of renewal, and under such circumstances the rule is stated in 35 Corpus Juris, p. 1022, Sec. 151, thus:

"Effect. Where a timely notice is given or request made for a renewal or extension under the provisions of the lease, the rights and obligations of the parties become mutually fixed. The notice of itself constitutes a renewal, and automatically creates a new lease, and failure to acknowledge receipt of the notice does not prevent the renewal from becoming binding on the tenant."

So also at Section 153 in the same volume and page the author restates the rule as follows:

"Effect of Election. When an election is once made, both parties to the lease become bound thereby, and the lessee, having elected to accept a renewal, is entitled to retain possession of the property."

In the general discussion of this subject many authorities will be found which differentiate between the mere holding over under (a) a lease not containing a privilege of renewal, (b) a lease containing a privilege of renewal and providing for notice of the intention to renew, (c) a lease providing for a privilege of renewal without any notice of intention to renew, etc., but none of these distinctions need be discussed here, for the reason that in the case at bar we have a lease containing a plain, simple, unequivocal privilege of renewal; an express and timely notice of the lessee's intention to renew notwithstanding the lease required no such notice. Stipulation Exhibits Nos. 19 to 22, inclusive; the receipt and acceptance of that notice by the board of public works; the holding over by the lessee under the lease, and the receipt by the state of all installments of rental for the renewal period. Under such conditions, or even under the combination of any two of them, the lease stands renewed.

In *Orr vs. Doubleday, etc.*, 223 N. Y. 334; 119 N. E. 552; 1 A. L. R. 339, the third clause of the syllabus is as follows:

> "The exercise by a tenant of the privilege of renewing a lease for an additional term creates a present demise for the aggregate of the first and extended terms without the necessity of a new lease for the additional years."

This case is interesting in that it discusses at length the distinction sometimes attempted to be made between a privilege or covenant of renewal and a privilege or covenant of extension, some authorities holding that the former is a right to the grant of an estate, the latter a present demise operative immediately upon the exercise of the privilege. In holding that the distinction is more fanciful than real, the court makes the following observations, so directly applicable to the case at bar that they are here reproduced in full:

> "In no subsequent decision by us has the question been considered. The distinction made by the body of judicial opinion we have referred to is too refined and theoretical to be real, as a matter of law in practical affairs. Men of ordinary learning, intelligence, and experience do not universally heed or invoke it in their business transactions. The law is neither just nor practical when it founds decisions of controversies exclusively upon that distinction. The word 'renewal' or the words 'to renew' have not a definite and fixed legal significance to which the parties are bound by the use of them.
>
> A lease, like any other contract, is to be enforced in accordance with the expressed intention of the contracting parties. If interpretation of its language is necessary, the proper and established rules are to be applied. The language in

> question of the lease at bar means that the demise was for ten years absolutely and for ten additional years in case the lessee so elected, and gave the required notice of its election. The lease is a present demise of the premises. The defendant entered into occupation under it. The lessor had no choice or decision in the matter of renewal. The letting was for the term of ten years 'with the privilege to said tenant of a renewal for another term of ten years upon the same terms as are contained herein.' There is no express covenant on the part of the lessor to enter into a new lease or do other act. The only acts called for to effect the renewal are on the part of the defendant. The renewal did not evoke new conditions of continuance in occupation, and a new lease would be useless."

But even if a notice of intention to renew was necessary under the Law and supplementary leases, such a notice was given by the appellee and accepted by the board.

We have been unable to find any decisions of the Ohio Supreme Court on this general subject, the rule being apparently so well settled that litigants in cases of this character have been content to stop with the Court of Appeals. In *Gross vs. Clauss*, 6 Ohio Appeals 140, the first clause of the syllabus is as follows:

> "A lease for a term with a privilege or option in the tenant of a renewal or extension for a further term, upon the same terms and conditions, is a present demise as to the renewal to begin at a future time, and under such covenant no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term."

The case at bar is an even stronger one in favor of the appellee because here appellee has notified the board of its intention to renew, whereas in the case last cited no notice of the intention to renew was given, the lessee merely continuing to occupy the premises and to pay the rent for three months after the expiration of the original term.

In *Owen vs. Barrie*, 14 Ohio Appellate Reports 104, the court concedes that the holding over constitutes an election to hold for the extended term in cases where the lease requires no notice of the intention to exercise the option. That is true of the leases in the case at bar and here we have the added fact that appellee, as has already been seen, gave notice of its intention to renew, notwithstanding the leases did not so require.

In *Foster vs. Ellison*, 31 O. C. C. 513, the second clause of the syllabus is as follows:

> "Title Quieted of Lessee of Permanent Leasehold Upon Election to Renew and Payment of Rent Arrearages.
>
> A lessee under a lease for three and one-half years renewable forever, holding over twenty days before notice to vacate the premises is served upon, thereby elects to renew; and having offered to pay all arrearages of rent due on the lease, conditions upon which forfeiture could be declared for non-payment of rent not having been complied with by lessor, the lessee is entitled to a decree quieting his title to a permanent leasehold."

In *Crenshaw, etc., Lumber Company vs. Norton*, 72 Southern 140; L. R. A., 1916 E., p. 1227, the second clause of the syllabus is as follows:

"Landlord and Tenant—Option for Renewal—Necessity of Notice.

2. No notice of intention to renew is necessary under a lease covenanting that the lessee shall, at the expiration of the term, have the option to renew, without any provision for the execution of a new lease, there being but a mere contemplation of an extension under the old one."

Nor will the court fail to note that under the Law lease in question not only was no notice of the intention to renew required, but the lease specifically provided that the renewal should be "on the terms of this lease." True, this proviso was subject to the contingency, expressed in a prior clause of the lease, that there should be no higher bid for the water rights, but there was no such higher bid, and so that contingency may be disregarded.

In 2 Underhill, Landlord and Tenant, page 1377, paragraph 809, the author states the rule as follows:

"Where a lease conferring an option to renew upon the lessee omits to provide that he shall notify the lessor of his election to renew, a notice from him to his lessor of his intention to renew is not required. In such case the lessee's merely remaining in possession after the term has expired is an exercise of the option to renew, and binds both him and his lessor for a new term."

The question being so well settled, further citation of the rule would seem to be superfluous. Brief reference is, however, made to the following cases:

In *Thurston vs. Woolworth Company*, 117 Northeastern 686, Ind. App., the court held that in the absence of a specific provision in the lease, any form of

notice indicating an intention on the part of the tenant to avail himself of the option of renewal is sufficient.

In *House vs. Burr*, 24 Barb. 525, it was held that notice by a lessee that his assignee desired to exercise the privilege of renewal under a lease was sufficient.

Even an oral notice has been held to be sufficient.

Gaggiano vs. Gallorenzi, 57 N. Y. Supp. 2:
McClelland vs. Bush, 150 Pa. 57.

Other cases to the same effect are cited in the note in 1 A. L. R., page 344.

It has even been held that where the lease does not show how notice of an intention to renew shall be made, an oral notice is sufficient.

Darling vs. Hoban, 53 Mich. 599.

We only cite these cases to show how fully within the rule is the case of the appellee's renewal of the Law and supplemental leases. Without any provision or requirement for notice of its intention to renew, appellee has nevertheless given such a notice. Without any provision for a notice in writing, appellee's notice to the board nevertheless took that form—and we have been unable to find a single authority upon which it could be even remotely claimed that the Law and supplemental leases do not now stand renewed for thirty years from March 12, 1925.

It will be remembered that appellee's four minor leases, the Studer, Tryon, Maumee Paper Company, and Detwiler leases, have not yet expired *even in their primary terms* and do not expire *until the year* 1931 for one of them, 1933 for two of them, and 1936 for the fourth

one, but each one of them contains a renewal clause in the same wording as is contained in the Law lease, and appellee's application for a renewal of the Law and supplemental lease included application for renewal of these four minor leases. Whether any one of these four leases (minor leases so-called but minor only in that they do not sell or lease to appellee as much water as is sold or leased to it by the Law lease) shall be renewed at the end of its primary period of thirty years will of course depend upon circumstances at the end of its primary term. Appellee has already, as shown above, elected to renew each of them, but appellee of course will be compelled to pay a higher rental for the renewal term of thirty years in each case if any outside party shall see fit to bid a higher rental than appellee is now paying under the primary term. There can scarcely be any question, however, but that appellee will elect to pay such higher rental if any shall be offered because the water called for by each of these leases is used at the hydro-electric plant to make up the total of 422 second feet of water used there in operating the plant as nearly to its capacity of 2700 horsepower as possible and appellee considers its said election to renew them as final and binding on it in any event.

Referring again to the renewal of the Law lease as modified by its supplementary agreement, appellants make no claim that appellee has ever been in default in any respect in the performance of its obligations under said lease and supplementary agreement. As shown above, appellants admit that appellee has fully performed all its obligations and they admit that appellee in August of 1924 duly filed its application for renewal of

all these contracts, such election and application for renewal being thus made six months prior to the expiration of the primary term of the Law lease and its supplementary agreement, said primary term expiring on March 12, 1925. Full performance by appellee of all of its obligations under the contracts and of its regular and timely election and application to renew such contracts was admitted by defendants in the case of *The Maumee Valley Electric Company vs. Toledo*, 13 Fed., 2nd Series, 98-105, but defendants there claimed that the Law lease and its supplementary agreement had not been renewed because, as they claimed, such contracts had all been cancelled, rendered null and void, by the passage of the Act of January 22, 1920, declaring an abandonment for canal and hydraulic purposes of Lineal Part 1, which Act was construed in that case and under which Toledo bought Lineal Part 1. Defendants in that case made that claim notwithstanding that legislative Act fully recognized, ratified and confirmed all these contracts and expressly provided that if Toledo should buy Lineal Part 1 it must buy it, and the deed therefor would only be given by the state to Toledo excepting therefrom and subject to the rights of the state's lessees under their existing leases for either land or water or both and the rights of such lessees to a *renewal* of such contracts.

3. **Appellee's Seven Contracts Existing Between It and the State of Ohio Were Entered Into and Carried on by Ohio in Its Proprietary or Private Capacity Through Its State Board of Public Works Thereunto Duly Authorized by Law, and the Contract Entered Into by Ohio Direct With the City of Toledo, Through Legislative Enactment, for the Use and Benefit of Appellee Was Made and Entered Into by Ohio in Its Proprietary or Private Capacity. Each of These Two Classes of Contracts Is Within the Protection of Section 10 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to that Constitution.**

a. *Appellee's Contracts Given by Ohio in Its Private Capacity*: The first discussion under this point of law will be with reference to appellee's seven contracts which we claim were entered into and have been carried on by the State of Ohio in its proprietary or private capacity through its State Board of Public Works thereunto duly authorized by law (except that since amendment to the Constitution in 1912 the Superintendent of Public Works, successor to the Board, has been the state administrative authority), and that these contracts are within the protection of Section 10 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment of that Constitution against the legislative Act attacked in this case, passed May 11, 1927. (Appendix, Paragraph 39, page 236.) Appellants claim that these contracts are ruled by the cases of

Hubbard vs. Toledo, 21 O. S. 379, decided in 1871;

Elevator Co. vs. Cincinnati, 30 O. S. 629, decided in 1876;

Fox vs. Cincinnati, 33 O. S. 492, decided in 1878; 104 U. S. 783; 26 L. Ed. 928; and

Vought and Walsh vs. C. H. V. Ry. Co., 58 O. S. 123, decided in 1898; 176 U. S. 478; 44 L. Ed. 548;

and that under those cases appellee's contracts must be held to have been entered into and carried on by the State of Ohio in its governmental or public capacity and that such contracts are not within the protection of the contract clause and the first section of the Fourteenth Amendment of the United States Constitution.

The question as to whether appellee's contracts are such contracts as are protected by the sections referred to of the Federal Constitution is a question which this court will decide for itself. This is not a case in which this court, without independent action on its part, regardless of the facts, is concluded by prior decisions of the Supreme Court of Ohio.

Jefferson Branch Bank vs. Skelly, 1 Black 436-443; 17 L. Ed. 173-177.

In this case the Jefferson Branch of the Ohio Bank had been organized under the Act entitled, "An Act to incorporate the State Bank of Ohio and other banking companies," passed February 14, 1845. Under the sixtieth section of that Act any bank organized under the Act was required to set off to the state six per centum of its profits and this was to be paid to and received by the state in lieu of all taxes which the bank and its stockholders on account of the stock held by them were bound

to pay. Thereafter in 1852 the legislature passed an Act providing for the assessment and taxation of all property in the state according to its true value in money, and in pursuance of that Act the county authorities levied upon the property of the Jefferson Branch Bank for the year 1852 the sum of $5,303.70 as taxes. The county treasurer, Skelly, defendant in error, entered the banking room of the bank and seized that amount of money to satisfy the tax levied under the Act of 1852 and penalty for default on the part of the bank in making payment thereof. It was claimed in the case by the district attorney, counsel for the county, that this court was bound by the prior decision of the Supreme Court of Ohio which held that the charter of the bank was not a contract within the protective provisions of the Federal Constitution forbidding the impairing of the obligations of contracts. In answer to this claim Mr. Justice Wayne, delivering the opinion of the court, used the following language:

> "We answer to this, as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the states to state legislation and to state constitutions, have been conclusive upon this court, with a single exception, and that is when it has been called upon to interpret the contracts of states, 'though they have been made in the forms of law,' or by the instrumentality of a state's authorized functionaries, in conformity with state legislation.
>
> "It never was intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, follow the construction of

the Supreme Court of the state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state, by its authority."

Appleby vs. New York, 271 U. S. 364-379; 70 L. Ed. 992-999.

In the *Appleby* case the City of New York in 1730 under charter granted by the executive representative of the crown acquired title to the land between high and low water surrounding the Island of Manhattan. These grants were afterwards confirmed by the Constitution of 1777 of the State of New York, and by the Act of 1807 the State of New York granted to the city a strip of land under water along the westerly side of the island which extended from low water mark westerly into the Hudson River a distance of 400 feet. In 1853 the city granted to Appleby land under water between 39th and 40th Streets. The deed was one granting title in fee simple to Appleby, his heirs and assigns forever. Under authority of an Act of 1871 the city authorities excavated the ground underneath the water in 39th and 40th Streets and alongside the lands conveyed to Appleby covered by the deed to Appleby and made use of the outer portion of this ground for public docking purposes, claiming that the City of New York had no authority or power to grant the title in fee simple conveying both the private and the public right to this land under water. The question in the case was whether the

deed was a contract, and if so, whether its obligations were impaired by the legislative Act of 1871. The Court of Appeals of the State of New York held that the deed was not such a contract and was not within the protection of the contract clause of the Constitution. It was claimed on error to this court that it was controlled by the decision of the Court of Appeals of the State of New York, and in answer to that claim Mr. Chief Justice Taft in the opinion at pages 379 and 380 says:

> "The questions we have here to determine are, first, was there a contract; second, what was its proper construction and effect, and third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course, we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the state and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the state, as it was when the deeds were executed, to be derived from *statutes then in force* and from the *decisions of* the state court *then* and *since* made; but we must give our own judgment derived from such sources

and not accept the present conclusion of the state court without inquiry.

Ordinarily this court must receive from the court of last resort of a state its statement of state law as final and conclusive, but the rule is different in a case like this."

Larson vs. South Dakota, — U. S. —, decided by this court February 18, 1921.

Each of the above cases was a case reviewed in this court on error to the court of last resort in the state in which it originated, but we take it that the principles declared by this court in the language quoted above in the *Skelly* and *Appleby* cases apply in the instant case in deciding the question whether appellee's contracts are ruled by the *Hubbard, Elevator Company* and *Fox* cases cited above and decided many years ago on the particular facts of those respective cases, or whether appellee's contracts in question here and differing widely, not only in the contracts themselves, but in the facts and circumstances as well under which they were written and have been operated from the beginning until now, shall be ruled by later decision of the Supreme Court of Ohio applying, as we contend, to appellee's contracts and the facts and circumstances under which they were written and have been and are being carried out.

The *Hubbard, Elevator Company* and *Fox* cases were cases involving parts of the Miami and Erie Canal. The *Vought* and *Walsh* cases involved a part of another canal not connected with the Miami and Erie Canal, namely, the Hocking Canal in the south central part of the state, and being a part of the Southern Division of

the Ohio Canal. Appellee's contracts and its rights thereunder under the facts and circumstances of such contracts are governed by the case lately decided by the Supreme Court of Ohio, 1926, of *State ex rel. Crabbe, Attorney General, vs. The Middletown Hydraulic Company*, 114 O. S. 437, 448, in which case that court in defining the capacity in which the State of Ohio now owns and since the termination of navigation on the Miami and Erie Canal has held and owned that Canal and the lands thereof, declared as follows:

> "Whatever may have been the capacity in which the state functioned in the construction of the Miami and Erie Canal for the purpose of a navigable highway across the state for the use of the general public, its function now, since the abandonment of the canal as a navigable highway, is that of a commercial proprietor, engaged in the operation of a great power plant for the sale of power and water to private individuals, and the rights of the state, as such proprietor, in this particular property, which have not heretofore been judicially determined, but are to be determined now for the first time, should be and will be measured by rules that are applicable to proprietors generally and applicable to like transactions between private individuals.
>
> In conducting transactions with respect to its lands, the state acts in a proprietary, and not in a sovereign capacity, and, being amenable to all the rules of justice which it prescribed for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains. *Cleveland Terminal & Valley Rd. Co. vs. State ex rel.*, 85 Ohio St. 251; 97 N. E. 967; 39 L. R. A. (N.S.) 1219.
>
> When the state appears in her courts as a suitor, to enforce her rights of property, she comes shorn of her attributes of sovereignty, as

> a body politic, capable of contracting, suing, and holding property, subject to those rules of justice and right, which in her sovereign character she has prescribed for the government of her people. *State vs. Executor of Buttles*, 3 Ohio St. 309."

This case was an action in *quo warranto* in the Supreme Court of Ohio filed by the State of Ohio on relation of the Attorney General versus the defendant Middletown Hydraulic Company. The defendant was a corporation organized under the laws of Ohio. The petition alleged the state ownership of what was known as the Middletown feeder, a part of the Miami and Erie Canal; that the defendant owned and operated a manufacturing plant located in the vicinity of the feeder and that the defendant then was and for a long time had been diverting water from the feeder to its manufacturing plant for manufacturing purposes without authority of law and without the consent of the state; and the prayer was that the defendant be required to answer on what authority it claimed to have used and enjoyed such rights, privileges and franchises set out in the petition. The facts were that prior to the construction of the Miami and Erie Canal one Abner Enoch owned the lands upon which the Middletown feeder was afterwards located and he owned the water rights which he had acquired at that point prior to any possession by the state as a proprietor. Enoch had constructed a mill race on these lands for the purpose of drawing water from the Miami River through such mill race for the operation of his mill. On July 28, 1825, Enoch gave a deed to the State of Ohio which recites:

> "In consideration of the benefits which will be conferred upon all who own real property in the

vicinity of the said canal and upon myself in particular, and also in consideration of the sum of one dollar to me in hand paid by the said commissioners in behalf of the said state, I hereby for myself and my heirs give, grant, cede and forever transfer to the State of Ohio all the lands belonging to me which shall be necessarily occupied by the site of said canal and also by the site of the towing paths, feeders, aqueducts, reservoirs, spoil banks and culverts connected therewith. (All water privileges reserved to myself as to mill seats, etc.)"

The state constructed a dam across the Miami River and from that river beginning at a point above the dam it constructed a feeder over and through Enoch's mill race site of sufficient capacity to supply the state's needs for canal purposes and the needs of Enoch, and it constructed a weir or gauge in the feeder for the use of Enoch in furnishing the water he had theretofore been using from the river from above his own dam. Water was thus supplied to Enoch for thirty-two years after the transaction between him and the state and then to the defendant Hydraulic Company, his successor in title, for sixty-eight years.

The Hydraulic Company filed an answer in the case setting up five defenses to the state's action in *quo warranto*.

Its first defense pleaded the reservation by Enoch of his water rights from his grant to the state of the land upon which the Middletown feeder was constructed and pleaded the succession by defendant to those water rights of Enoch and it denied a diversion by it of any other water from the feeder.

The second defense in detail pleaded the ownership by Enoch of the lands upon which the feeder was afterwards located and the water rights which he had acquired at that point prior to any possession by the state, pleaded the conveyance by Enoch to the state of the lands upon which he had theretofore erected a mill race, the reservation from that grant of his water rights and the acceptance of that grant by the state with the reservation. The defense further pleaded that the waters available from the river at that point were far greater than necessary for the operation of the canal and that they were and ever since have been sufficient for the purposes of the canal and the purposes for which Enoch theretofore acquired the water rights; that afterwards the state entered into a contract with Enoch to construct a new dam, feeder and head gates upon or near the site where Enoch had theretofore maintained the dam; that in such contract it was provided that the dam, feeder and head gates should be constructed of capacity sufficient to provide water both for the canal and the use of Enoch; that the state did construct a dam, feeder and head gates of such capacity for the purpose of continuing unto Enoch, his heirs and assigns, his water rights as before the construction of the Miami and Erie Canal; that defendant succeeded to the title of Enoch and the continuous use by defendant and its predecessor for one hundred years and the use by defendant in the case since 1857, all with the knowledge and consent of the state; alleges the partial destruction in 1913 by flood of a former feeder and dam and reconstruction thereof with a diversion dam for the use of defendant Enoch by the State of Ohio in pursuance of its contract of 1826 with Enoch,

and it pleads continuous observance and compliance with that contract by the state through all that period; and it pleads ownership in defendant of the lands adjacent to the state dam and that it is entitled to all the riparian rights of such ownership, subject only to the grant to the state for navigation purposes.

The third, fourth and fifth defenses are described by the court (441, 442) in its opinion as follows:

> "The third defense avers that the State of Ohio, under the act authorizing it to construct and operate the Miami and Erie Canal, was only authorized to and only did appropriate such waters from the Miami River through the Middletown feeder as were necessary for the purpose of navigation in and along the canal from what is known as the state dam to the City of Cincinnati, taking into consideration all waters that were delivered to such canal from various other sources north of such dam; that the State of Ohio has now abandoned the Miami and Erie Canal from the state dam northwardly, and no water is furnished for such canal north of the state dam, either for navigation or any other purpose, and that the State of Ohio is now diverting from the Miami River above the state dam larger quantities of water than it is entitled to have under the terms of the act permitting the appropriation of water for canal purposes and under its agreement with Abner Enoch; that the State of Ohio has abandoned for navigation purposes the Miami and Erie Canal from the state dam southwardly to the City of Cincinnati, and has permitted bridges, viaducts, and other constructions to be built across the canal that make it impossible to use the canal for navigation purposes; that since 1913 no portion of the canal has been used for navigation, and it is not the intention of the State of Ohio to again use the canal for that purpose; that the purpose of the construc-

tion of the canal has entirely ceased; that the State of Ohio, under the act providing for the construction of the canal, and under its contract with Abner Enoch, is not entitled to take any water from the river for the purpose of providing hydraulic power to manufacturers and others; that the act of the State of Ohio, permitting it to lease water for power purposes, authorized only such as were incident to the use of the canal for navigation, and that the State of Ohio is without power, under any act of the legislature, to own, operate, or maintain a canal solely for the purpose of leasing water to others for power purposes.

The fourth defense is a plea of estoppel against the state by reason of its pleadings and the decree in the case of *Enoch vs. State of Ohio*, in the Butler County Common Pleas and in the Ohio Supreme Court; and the fifth defense is estoppel of the state by its standing by and permitting and encouraging the expenditure of money by the defendant and its predecessors in title for one hundred years on the strength of a title which the state for all that period recognized."

The state filed a demurrer to each of these defenses. The court in passing on the demurrer to the first and second defenses on page 443 of the report says:

"Since the defenses one and two are in the main the same, we will consider them and the demurrer to them as raising the question of the validity of the reservation, from limitation of or exception to the grant of Abner Enoch to the state, and the right of the defendant, as a successor to Enoch, to divert water from the Middletown feeder."

It was in passing upon the demurrer to the first and second defenses, as shown above, that the court used the language hereinabove quoted deciding as to the capacity in which the State of Ohio owns and controls the canal

lands of the Miami and Erie Canal, and also deciding as to what rules of law govern the state in its dealings with citizens with respect to such lands.

Then when the court comes to pass upon the third defense (457) as set out above, challenging the power of the state to maintain the canals for the purpose of leasing water to others for power purposes and to pass on the demurrer filed by the state to that defense, it uses the following language:

> "The third defense, that the state, having abandoned the purpose for which it acquired its Miami and Erie Canal water rights, is now without authority of law exercising those water rights for a wholly different purpose, is met by the two principles heretofore discussed.
>
> (1) That in its proprietary capacity, its property rights are the same as those of private proprietors.
>
> (2) That the specific purpose for which it acquired water rights does not limit it to the use of those rights for that purpose, unless it is expressly prohibited from using them for any other purpose, but the specific purpose for which they were acquired operates as a limitation of quantity and not of character of use.
>
> The demurrer to the third defense is sustained."

The defendant Hydraulic Company by its first and second defenses sought to establish that it, as the successor to the rights of Enoch, was taking water out of the Miami and Erie Canal by virtue of the reservation inserted by Enoch in the deed to the State of Ohio, and claimed, of course, that it was exercising a right which had never passed to the state. The court sustained defendant in this contention and overruled the demurrer of the state to these two defenses. But defendant de-

sired the court to hold under its third defense that the state could not operate the canal for the purpose of supplying water power to individuals generally under leasing contracts because the State of Ohio had never been authorized, and was without power, under any act of the legislature to own, operate or maintain a canal solely for the purpose of leasing water to others for power purposes after navigation thereon has been abandoned.

As stated above, the state demurred to this defense thereby claiming of course that it did have such power. The court sustained the state's demurrer to this defense and therein sustained its contention that it did have such power.

Let us not forget that when defendant company in the *Middletown* case interposed the defense of lack of power in the state to maintain the Miami and Erie Canal for the purpose of leasing water to individuals generally under leasing contracts for power purposes after navigation thereon had been abandoned, the state immediately accepted the challenge (and rightfully so), filed a general demurrer to this third defense and under the decision of our highest state court it was sustained. On that important question—important to the State of Ohio from the standpoint of revenue and important to all of her citizens using hydraulic power from this canal—our Supreme Court established the rule which we must assume the state in that case earnestly desired.

The court in its opinion says that this grave question of the power of the state to maintain and operate this canal for water power after abandonment of navigation thereon was then before the court for the first time with respect to the canal lands of the Miami

and Erie Canal. It was not speaking of simply the lands occupied by the Middletown feeder and the particular dam from above which water was being drawn through said feeder furnishing hydraulic power to Enoch and other people, but it speaks in broad and inclusive language involving the entire property of the Miami and Erie Canal. What other rule could the court in justice and equity to citizens and in conformity with proper and intelligent administration of this property of the state declare upon the question involved? A great purpose for which this canal was constructed (defendants claim it was the only purpose), namely, navigation, had been abandoned for many years. As to the property in question in the instant case, such transportation has been abandoned for practically thirty-five (35) years. The progressive commercial enterprise of the people of Ohio carried them far in advance many years ago of such slow moving, lethargic transportation. They have forgotten canal transportation. It now would be a curiosity to witness. The state is no longer and for thirty-five years it has not been a common carrier by such transportation. That branch of its business is gone. Defendants, this court and everybody knows it can never be revived. This property then belongs to and is in the possession of the state in the same capacity as any farmer owns his farm, any merchant his store, or any manufacturer his factory. It is not now and it has not been for practically thirty-five years operated by the state in its public governmental capacity, but in its *private or proprietary* capacity simply as a land owner.

The fact of abandonment set up in third defense of the Hydraulic Company was not an abandonment

effected through any legislative enactment. It was abandonment through refusal by the public to use the canal for navigation purposes. In its third defense the Hydraulic Company pleads that the state had abandoned the canal for navigation purposes southwardly from the state dam above Middletown to the City of Cincinnati, and had permitted bridges and other constructions to be built across it; that since 1913 no portion of the Miami and Erie Canal had been used for navigation and that it is not the intention of the state again to use the canal for navigation.

The General Assembly of Ohio has passed nine abandonment Acts affecting the Miami and Erie Canal and effecting an abandonment thereof throughout its length from the Ohio River to Lake Erie, except that portion extending from Defiance, Ohio, along the Maumee River northeasterly to the southwesterly end of Lineal Part 2.

The first Act, passed March 24, 1863 (Appendix, Paragraph 32, page 221), abandoned the south end of this canal in Cincinnati.

The second Act, passed March 26, 1864 (Appendix, Paragraph 33, page 223), abandoned the north end of this canal in the City of Toledo from Lake Erie south to the northerly end of Lineal Part 1.

The third and fourth Acts, passed April 12, 1888, and March 3, 1891, respectively (85 O. L. 207; 88 O. L. 72), effected an abandonment of that portion of the Miami and Erie Canal which was formerly known as the Wabash and Erie Canal extending from the City of Defiance southwesterly to the west Ohio state line in Paulding County, Ohio.

The fifth Act, passed January 22, 1920 (Appendix, Paragraph 35, page 225), abandoned Lineal Part 1, which is the part purchased by Toledo under that Act.

The sixth Act, passed March 25, 1925 (Appendix, Paragraph 36, page 230), abandoned simply for canal purposes that portion of this canal extending from the Maumee River at the City of Defiance in Defiance County southerly to a point five hundred feet north of the Middletown Dam near the north corporation line of the City of Middletown, Ohio, and this Act provides for the leasing of certain portions of these lands to cities, villages and other political subdivisions of the state.

The seventh Act, passed March 27, 1925 (Appendix, Paragraph 37, page 230), abandoned Lineal Part 2 of this canal extending from the Maumee side-cut in Maumee to the Grand Rapids State Dam at Providence, Ohio, and provided for the sale of the same to the county commissioners of Lucas County, Ohio.

The eighth Act, passed April 21, 1927 (Appendix, Paragraph 38, page 236), abandoned for canal and hydraulic purposes that portion of the Miami and Erie Canal from a point five hundred feet north of the State Dam near the corporation line of the City of Middletown, Ohio, to the then southern terminus of said canal at St. Bernard in the City of Cincinnati, Hamilton County, Ohio.

The defendant's water power in the *Middletown* case is located on this part of the canal, and the above mentioned Act is the first and only legislative Act abandoning that part of the canal. It must be taken as established, therefore, that in deciding the *Middletown* case the Supreme Court of Ohio was not basing its opin-

ion and decision upon the fact of abandonment of the canal for navigation purposes through legislative act, but really upon the fact that navigation had actually been abandoned through refusal of the public further so to use the property. It is true the pleader says that the state had permitted bridges to be put across the canal and it did not intend to use the canal further as a means of navigation, and of course under the demurrer of the state those allegations were admitted, but in the instant case it is specifically pleaded and admitted that navigation had been practically abandoned prior to the year 1894, totally gone before appellee's contracts were acquired; and that it has never been revived (R. 5).

The ninth and last abandonment Act, passed May 11, 1927 (Appendix, Paragraph 39, page 236), is the Act in question in this case seeking to reabandon Lineal Part 2 and declare all water and land contracts null and void.

The conclusion t[illegible]fore seems definitely established and unassailable that the Supreme Court of Ohio in the *Middletown* case decides and rules that since the abandonment by the public of the Miami and Erie Canal as a navigable highway, Ohio owns that property as a commercial proprietor engaged in the operation of a great power plant for the sale of power and water to private individuals, and this even though the state originally constructed such canal for the purpose of navigation, and the case further definitely decides and rules that since such abandonment of navigation the rights of the state in this property must be measured by rules that are applicable to proprietors generally and applicable to like transactions between private individuals.

Of course the court in deciding the *Middletown* case had in mind and was thoroughly acquainted with the *Hubbard, Elevator Company, Fox* and other similar cases upon which appellants rely. The facts and circumstances out of which those cases arose and were decided were wholly unlike the facts and circumstances of the *Middletown* and the instant cases. The difference will be specifically pointed out later in this brief.

b. *Purposes of the Miami and Erie Canal*: Looking to the legislative history of this canal showing the purposes for which it was projected and constructed, namely, navigation for the public and the furnishing of hydraulic power to private individuals, the beginning of decline of navigation within a relatively few years after completion of the construction in 1845, such decline really beginning prior to 1861, and finally total abandonment thereof practically thirty-five years ago while furnishing hydraulic power to private individuals has continued from the beginning of the construction in 1825 to the present time, it is not difficult to see how the Supreme Court of Ohio reached the conclusion and decided as it did in the *Middletown* case.

This canal was constructed under authority given through the Act of February 4, 1825, and the first section thereof from the Ohio River to Dayton was actually authorized by that Act to be put under contract. Section 8 of that Act gave to the canal commissioners the power of eminent domain authorizing them to take possession of and use any lands, waters, streams and materials necessary for the prosecution of the improvements intended by the Act, and to make all such canals, feeders,

dykes, locks, dams and other devices proper for making said improvements, and it provided that all such property should be acquired by the state in fee simple. (Appendix, Paragraph 6, page 200.)

While this Act was entitled "An Act to provide for the internal improvement of the State of Ohio by navigable canals," yet in Sections 5 and 6 of the Act language is used which clearly shows that the General Assembly meant that the state's authorities should promote hydraulic power. Section 5 of the Act, as a means of repaying borrowed money, appropriates and pledges

> "All the net proceeds of tolls collected on the canals and herein described *and of the rents and profits of all works and privileges* connected with or appertaining to said canals and belonging to the state,"

and Section 6 provides that all moneys pledged and appropriated by the Act,

> "together with the net proceeds of all tolls *and of the rents and profits of all works and privileges* connected with said canals,"

should be paid into the state treasury and kept distinct from the other funds of the state.

Section 7 of the Act passed January 31, 1826, provides as follows:

> "That no person shall construct any wharf, basin or watering place on or make or apply any device whatever for the purpose of taking water from either of said canals without first obtaining permission therefor of one of the acting commissioners or of the principal engineer of the canal where such wharf, basin, watering place or device, as aforesaid, is desired, in writing." (Appendix, Paragraph 8, page 204.)

Section 1 of the Act passed February 7, 1826 (Appendix, Paragraph 9, page 205), provides:

> "That the canal commissioners be and they are hereby authorized to procure by purchase or otherwise a suitable number of acres of land at each and every point on or adjoining the Ohio canals heretofore authorized to be constructed where the surplus water passing through such canals may be profitably used for *hydraulic* purposes."

An expenditure of $20,000.00 was authorized by this section for the purposes above stated.

Section 2 of this Act provides:

> "That the canal commissioners are hereby authorized and empowered to sell such lands and town lots as have heretofore been or may hereafter be given, granted or ceded to the state for the benefit of the canal fund, *other than those which are situated at points or places on or adjoining the line of the Ohio canals where the surplus water produced by said canals can be advantageously used for hydraulic purposes.* (Paragraph 11, Stipulation Exhibit No. 23.)"

Section 5 of the Act passed February 11, 1828 (Appendix, Paragraph 11, page 206), provides:

> "That whenever, in the opinion of the board of canal commissioners, any water may be spared from any state canal or works connected therewith without injury to the navigation or safety of such canal, the board may order a sale of such surplus water for a term of years in their discretion to the person who shall bid the highest annual rent therefor; provided, the same shall not in any wise interfere with the rights of individuals. (Paragraph 14, Stipulation Exhibit No. 23.)"

The above section was construed by the Supreme Court of Ohio in the case of *Cooper vs. Williams*, 4 O. Rep., page 253, in which it was held that:

> "Courts of equity cannot control the canal commissioners, in using the quantity of water necessary for the navigation of the canal, upon the complaint of individuals claiming an interest in the water, nor in selling it for hydraulic purposes."

By the Act passed February 18, 1830 (Appendix, Paragraph 15, page 208), in Sections 3 to 7 thereof the canal commissioners were given power to sell or lease at any time for *hydraulic* purposes any lands along or waters from any of the canals of the state or passing around locks, not required, in their opinion, for the purposes of navigation, and these leases or sales could be made

> "Subject to such conditions and reservations as they may consider necessary and proper either in *perpetuity* or for a limited number of years for a certain annual rent or *otherwise* as they may deem most beneficial for the interests of the state."

By the Act passed March 3, 1831 (Appendix, Paragraph 17, page 210), the canal commissioners, with respect to the establishment of hydraulic power, were given power as follows:

> "That where any feeder to either of the canals of this state, from any stream which is not navigable and a public highway, has been constructed, or many hereafter be constructed, at the expense of the state, by which a greater quantity of water may be introduced than is required for the purposes of navigation, thereby creating valuable hy-

> draulic privileges, either on said feeder or on the canal receiving water therefrom; and where the introduction of such additional quantity of water will injure mills or mill sites on such stream between the point where the water is to be taken out, and the point at which it is to be returned into such stream; the canal commissioners shall be authorized to purchase for, and on behalf of the state, any such mill or mill site so liable to be injured, or the right to take from such stream such additional quantity of water, as either may be deemed best for the interest of the state; provided the sum to be paid for such mill, mill site or privilege, shall in no case exceed two-thirds of the sum for which the commissioners shall have ascertained the hydraulic privileges, to be supplied by such additional quantity of water can be sold; or said commissioners may at their option convey to any owners of any mill or mill site, so liable to be injured as aforesaid, a part of the water power to be created as aforesaid as a compensation for the damages sustained by the taking such additional quantity of water from such streams. (Paragraph 21, Stipulation Exhibit No. 23.)"

By the Act passed February 27, 1834 (Appendix, Paragraph 21, page 213), it was provided that all moneys arising from the sale of lands purchased, granted or donated to the state in aid of the canals,

> "together with the net proceeds of all tolls, fines and *water rents* derived from the canal north of Dayton,"

should be subject to the control of the commissioners of the canal fund and be applied to the extension of the canal.

The Act passed January 12, 1837 (Appendix, Paragraph 24, page 214), entitled "An Act appropriating money for the purchase of suitable lands for hydraulic

purposes," appropriated $25,000.00 to be expended in purchasing suitable land along Ohio canals where surplus water could be profitably used for hydraulic purposes.

The Act passed April 3, 1837 (Appendix, Paragraph 25, page 214), appropriated for the purpose of developing hydraulic power $6,000.00 on the Ohio Canal, $9,000.00 on the Miami Canal south and $5,000.00 on the same canal north of Dayton in addition to the sums theretofore appropriated.

By the Act passed March 19, 1838 (Appendix, Paragraph 26, page 215), in Section 13 thereof it was provided as follows:

> "That it shall be the duty of the acting commissioner on the Miami Canal to make selection of such lots of land as may be necessary to the proper use of any water power which may be created by the construction of said Miami Canal, and any works connected therewith, and any other lots which may be necessary to supply timber for the construction and repair of the canal; and shall furnish the register of the Lima land office with a list of all such selections before the sale of any of said lands, and such selections shall thereupon be by such register entered on record, and reserved from sale; and the state hereby reserves the right to make said canals through the lands sold under authority of this Act, clearing all claims for damages done to said lands. (Paragraph 31, Stipulation Exhibit No. 23.)"

By the Act passed March 23, 1840 (Appendix, Paragraph 27, page 215), the Sections 3 to 7, inclusive, hereinabove referred to and quoted in full in Appendix, Paragraph 15, page 208, giving the canal commissioners power to sell or lease water or land in perpetuity, were

re-enacted without change except that the board of canal commissioners in the Act of 1830 were in this Act of 1840 designated as board of public works.

In the Act passed March 7, 1842 (Appendix, Paragraph 28, page 218), by Section 12 thereof, it was provided as follows:

> "That it shall be the duty of the board of public works to make selection of such lots of land as may be necessary to the use of any water power which may be created by the Wabash and Erie Canal, or the Miami Canal, or feeders, or reservoirs therewith connected, and any other lots which may be necessary to supply timber for the construction and repair of the canal, and to furnish the register of the proper land office a list of all such selections, before the day fixed for the sale of any such lands; and such selection shall, thereupon, be entered upon record by the register, and reserved from sale; and the state hereby reserves the right to make the canals through the lands sold, under the authority of this Act, clear of all claims for damages done to said lands."

The legislative Acts quoted from and referred to above, beginning with the Act of 1825 and ending with the Act of March 7, 1842, show very clearly that the promotion and establishment of water powers and the furnishing of lands and water along and from the canals for hydraulic and other commercial purposes to private individuals for such purposes, was a distinct and definite purpose in the General Assembly of Ohio in providing for and constructing the state's canals.

There has never been any cessation of the practice of making such contracts as appellee owns from the beginning of the construction of the canal in 1825 to the present time, over one hundred years.

c. *Leasing of Entire Public Works and Decline of Navigation*: The decline of navigation on the canals must have begun prior to 1861, only sixteen years after the Miami and Erie Canal was completed. On May 8, 1861, 58 O. L. 117 (Appendix, Paragraphs 31 and 43, pages 219 and 248), the General Assembly passed an Act entitled "An Act to provide for the leasing of the public works of the State."

Sections 1 and 11 of this Act are quoted in full in the Appendix, Paragraph 43, page 248. Under Section 1 it was ordered by the General Assembly that the governor, auditor and treasurer of state should lease for the term of ten years from the day of the approval of the bond required by the Act, all the public works of the state consisting of the canals, including the one in question here, and the other public works heretofore named in this brief, together with all side-cuts, feeders, reservoirs, lock houses, collectors' offices, weigh-locks and leases of surplus water, connected with the same and appertaining thereto and owned by the state, "with the right to have additional surplus water," and it provided that all moneys derived from the leasing should be paid into the state treasury.

Section 11 of the Act provided for complete protection of the lessees of water for hydraulic purposes wherever the same might exist along these canals, that is protection against the lessees of the entire public works compelling such lessees of the public works to carry out all the contracts the state had theretofore made with individuals for hydraulic power.

Section 17 of this Act provides as follows:

> "This Act shall take effect on its passage: Provided, that nothing in this Act shall preclude the state from granting permission to the City of Cincinnati, to enter upon, and to improve as a public highway, and for sewerage purposes, all or any of that part of the Miami and Erie Canal, which extends from the east side of Broadway, in said city, to the Ohio River, the state hereby reserving the right to make such grant."

The legislature of the state must have been informed of the fact that navigation was declining for in this Section 17 it specifically reserved the right as against the lessees of the public works as a whole to grant permission to Cincinnati to enter upon and to improve as a public highway and for sewerage purposes that part of the Miami and Erie Canal extending from the east side of Broadway in Cincinnati to the Ohio River.

Thereafter in March, 1863, the legislature passed an Act abandoning to Cincinnati that part of the canal described in Section 17 quoted above and thereafter it passed the other abandonment Acts abandoning various portions of the canal, all of which Acts, nine in number, are described above in this brief.

The first abandonment Act was construed in the *Elevator Company* and *Fox* cases and the second abandonment Act, abandoning the Toledo or north end of this canal, was construed in the *Hubbard* case.

At this point we may add that on April 29, 1872, the legislature passed an Act, 69 O. L. 182, abandoning the north two and seven-eighths miles in length of the Ohio Canal in the City of Cleveland and therein provided for the sale of and thereunder sold such abandoned portion

to Cleveland with power to take, enter upon, improve and occupy as a public highway, *or for other purposes*, and for laying therein gas and water pipes and for sewerage purposes as the Council of Cleveland might determine. This abandonment Act was construed by the Supreme Court of Ohio in the case of the *Cleveland Terminal and Valley Railroad Company et al. vs. The State ex rel.*, 85 O. S. 251, and this is the case which was approved by the Supreme Court of Ohio in the *Middletown* case as determining the rights of the State of Ohio in dealing with its lands in its proprietary or private capacity.

When the General Assembly abandoned the Cincinnati end of this canal it took away therefrom its connection with the Ohio River as an outlet to commerce on that river. When it abandoned the Toledo end it took away from the canal its outlet to the Great Lakes and to any commerce thereon. And so the decline of navigation on this canal continued until, as it is admitted in this case, prior to the year 1894 it had practically disappeared, and when appellee acquired its first lease, the Law lease, navigation had wholly disappeared. Of course it is common knowledge with the people in this country that with the beginning of the development of railroad transportation immediately after the Civir War navigation on inland canals such as the one in question here and the others in Ohio, rapidly declined to complete cessation, and it is also common knowledge among all people that it was not possible to revive or continue such transportation in competition with railroad transportation.

d. *The State Passed to Private Capacity Through Refusal of Public to Use Canals*: From appellants' statement of points on which they will rely it appears that they claim the state could not pass from its status of ownership of the canals in its public or governmental capacity to an ownership thereof in its proprietary or private capacity except by declaration through an act of the law making body of the state, and if they claim that the Act of 1902 (Appendix, Paragraph 42, page 246) is evidence that the state had not intended so to pass and that this Act of 1902 was an attempt to revive navigation on he Miami and Erie Canal, then our answer is that it did not accomplish that purpose. It is admitted in the case that navigation was practically gone before the year 1894 and that it had wholly ceased prior to 1900 and that it has never been revived.

We may cite another instance of what probably was an effort on the part of the state to revive navigation on this canal, namely, the famous "Electric Mule" Act, passed April 25, 1898 (Appendix, Paragraph 41, p. 244). This Act gave authority to the Board of Public Works to grant by lease or permit to any party or parties or company the right to make any experiment with electricity as a motive power for the propulsion of boats or other craft on the Miami and Erie Canal by poles and overhead wires erected for such purpose, or by traction power on the berm banks or towing paths in such manner or under such regulations as the board might direct. The answer to this effort, if so it may be termed, is the same as the answer to the Act of 1902: navigation was gone and it has never been revived.

Further analyzing the Act of 1902, it does declare in

its first section that it was the policy of the state that the Miami and Erie Canal and the northern division of the Ohio Canal with all their water supplies, reservoirs, dams, feeders and adjacent lands should be retained as a public canal, although it does not there say that these canals should be so retained as public canals for *navigation.*

In Section 3 of the Act it declares that the ~~northern~~ southern division of the Ohio Canal from Dresden Junction to Lockbourne, and from Columbus to Portsmouth, and this included the Hocking Canal, should be retained and maintained although in that declaration it does not specifically declare for what purpose; but this Section 3 provides for the appointment of a commission by the governor to make an examination and investigation as to the condition of the southern division of the Ohio Canal, directing said commission to get all the facts bearing upon the question of its improvement, maintenance, its present and future usefulness as a canal and report the same, together with recommendations, to the next General Assembly and this section then provides that:

> "Pending which report the same shall be kept open for navigation."

It will be remembered that this southern division of the Ohio Canal had as one of its parts the Muskingum River.

Section 4 of this Act provides as follows:

> "The said board of commissioners, together with the board of public works, shall within the present year investigate all present water rate contracts on the two lines of canal mentioned in Section 1,

and revise and readjust them upon a fair and equitable bases as to the rents to be paid in the future.

The board of commissioners and the board of public works shall also investigate the water rent contracts upon the lines of the canal mentioned in Section 3, and make a special report to the next General Assembly as to what extent the rates for water rent may be increased."

The two lines of canal mentioned in Section 1 were the Miami and Erie Canal and the northern division of the Ohio Canal. In the light of the admitted fact that navigation had ceased on the Miami and Erie Canal some years prior to 1902, the language of the first paragraph of Section 4 is conclusive that the General Assembly considered the situation as settled that navigation on that canal could not be revived and it is further conclusive that the General Assembly intended to continue and further promote the project of furnishing hydraulic power and therein to get better revenues for the state from individuals with whom it held contracts for furnishing such power. This first paragraph of Section 4 does not declare with respect to this canal that the same should be kept open for navigation as it did declare with respect to the southern division of the Ohio Canal. If the General Assembly had intended that the Miami and Erie Canal should be kept open for navigation, it would have said so. The maxim, *Expressio unius est exclusio alterius* is clearly applicable here. *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 1, 22; 43 L. Ed. 341, 350. On the contrary, this Section 4 specifically authorized and commanded the board of commissioners and the board of public works to investigate all the then existing water

rate contracts on the Miami and Erie Canal and to revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future. This was an express legislative recognition, ratification and confirmation of all such contracts on the Miami and Erie Canal and it was an express legislative authority and command to the administrative officers, the board of public works, to revise and readjust all such contracts then in existence upon a fair and equitable basis as to the rents to be paid through the future running of such existing contracts. Appellee's contract, the Law lease, was then in that class.

If there was any lack of power in the board of public works, which we deny, prior to the Act of 1902 to write a valid and binding contract, such as appellee's contracts are, for a term of years extending beyond the time when navigation might cease either through failure of the people to use the canals for that purpose or through declaration by legislative act, this Act of 1902 insofar as the Miami and Erie Canal is concerned fully granted such power, and this at a time when Ohio owned this property in its private capacity.

The power granting statutes of 1830 and 1840 giving authority to the board of public works to enter into such contracts as those of appellee, in perpetuity or for a limited number of years at the discretion of the board, were still in force when the Act of 1902 was passed and they remained in force until the year 1917, when they were amended only in that the legislature then provided that such contracts could not thereafter be made for a longer term than twenty-five years. Hence, we say it is easy to see in the light of all the above related circumstances that the Supreme Court in the *Middletown* case could

not come to any conclusion other than that the state since navigation ended on the Miami and Erie Canal has owned and still owns that property in its proprietary or private capacity.

The issue in the *Middletown* case as to how much water the Hydraulic Company was entitled to take from the Middletown feeder and how much the state of Ohio was entitled to use was settled in the case of the *State ex rel. vs. The Middletown Hydraulic Company*, 116 O. S. 26, 27. Therein it was settled that the state was entitled to take 8,000 cubic feet of water per minute and the Hydraulic Company 19,463.50 cubic feet of water per minute.

Admitting that the primary and public purpose of the State of Ohio in constructing her navigable canals was the promotion of water transportation, it must also be admitted that the state systematically provided, as heretofore shown in the brief, for development of hydraulic power and to lease and sell water and lands along and from these canals for hydraulic power and other commercial and industrial purposes. This branch of the business of the state was not and never has been a public business in the sense that canal transportation was a public business. Under the laws of the state it was, of course, the right of every citizen to ship freight upon the canals to their capacity. The business of leasing and selling lands and water for hydraulic power, while clearly it was contemplated by the General Assembly from the beginning as a means of raising revenue through such accommodation to private individuals, was not and never has been such a business of the state as could accommodate any and all citizens in that line. Leasing and selling

water and land for hydraulic power and other commercial purposes could be done only at such points on the canal where such power could be developed and water spared for such purpose while navigation was in force. If there were two individuals at any point where hydraulic power could be developed and wanting such power, the state was not under any obligation to supply both of them to the capacity of the power, or either of them, and if it should see fit to supply either one of them it could sell all of the water available at that point to either one of them without any regard to the other. This is one of the surest tests of a private business. This branch of the business, therefore, was wholly a private business of the state engaged in with such individuals as the state might see fit to deal with on the best terms possible to be obtained through methods of competition even for the purpose of getting money with which to defray the state's expenses in keeping up and operating the canals in public transportation. What was in the beginning, however, the primary purpose, has been defeated and closed. Navigation on the canals terminated through refusal of the people of the state longer to use them in transportation. The Act of 1902 clearly recognized that situation.

Further, the state acquired these canal lands in fee simple, except in a few instances, and when navigation ceased it then owned them through the same title under which it originally acquired them. *Malone vs. Toledo*, 34 O. S. 541; *Ohio vs. Snook*, 53 O. S. 521; *State vs Railway*, 53 O. S. 189. The Act of 1825 provided they should be acquired through title in fee simple. Exceptions are shown by the *Middletown* and *Vought* cases *supra*, and

the Purdy Grant in this case. They were not acquired upon condition that they were to be used in the construction and operation of navigable canals and there were no reversionary clauses in any of the deeds or grants to the state when it acquired lands through deeds or grants, and if it took them through the process of appropriation, it acquired the fee simple title. These lands so acquired do not go back to the original owners, their heirs and assigns of the property through which the canals were constructed, upon the cessation of the state's use of them for navigable canals. Since navigation ceased on these waterways, the state, therefore, has owned these lands and still owns them simply in its proprietary or private capacity.

This court has often recognized the difference between public and private capacities of states and their political subdivisions, and it has pointed out the difference in attendant powers. *S. Carolina vs. U. S.*, 199 U. S. 437, 461-463: 50 L. Ed. 261, 269-270. In this case the State of South Carolina established dispensaries for the wholesale and retail sale of liquor and prohibited sale by other than its own dispensers. The United States thereafter demanded that South Carolina pay the license taxes prescribed by the federal internal revenue laws for dealers in intoxicating liquors. South Carolina paid these taxes to the year 1901. The dispensers themselves had no interest in the sale and received no profit therefrom. The entire profit went to the State of South Carolina. After 1901 South Carolina brought a suit against the government in the Court of Claims asking a refund of all the taxes thus paid. The court, Mr. Justice Brewer writing the opinion, held that the State of South Carolina

was engaged in a private business and not in a business under its public governmental capacity and the conclusion was reached by the court through a consideration of a number of cases decided up to that time determining that municipalities acted in two different capacities, namely, first, a public governmental capacity, and second, a proprietary or private capacity. The court applied the same rules to the State of South Carolina in this case and held the state liable for the tax.

Los Angeles vs. Los Angeles Gas & Electric Corporation, 251 U. S. 32, 38; 64 L. Ed. 121, 127. In this case Section 19 of the constitution of California adopted in 1879 permitted, in any city in California where there were no public works owned and controlled by the municipality for supplying same with water or artificial light, any individual or any company qualified according to the requirements of this section to use the public streets and ways of such city in laying down pipes, conduits, or other necessary equipment and facilities therein for introducing into and supplying the city and its inhabitants either with gas or other illuminating light or with fresh water for domestic and all other purposes, upon the condition only that this should be done under the direction of the superintendent of streets and such general regulations as the municipality might prescribe for damages, and the further condition that the municipal corporation should have the right to regulate charges made by the individual or corporation accepting the grant and building the plant. The Gas Company accepted the franchise extended by Section 19 and established a plant of sufficient capacity to meet the requirements of the City of Los Angeles and its inhabitants in

supplying electricity through a system of poles and wires and other works in the public streets of that city and in pursuance thereof occupied many of the streets thereof.

Section 19 of the constitution of 1879 was amended in 1911 providing that any municipal corporation might establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication; that such works might be acquired by original construction or by the purchase of existing works, including the franchises, or both; that persons or corporations might establish and operate such works, giving such services upon such conditions and upon such regulations as the municipality might prescribe under its organic law on the condition that the municipal corporation should have the right to regulate the charges thereof.

After the Gas Company had constructed its plant and occupied many streets of the city and after the amendment of Section 19 of the constitution, the city passed an ordinance providing for the construction of a municipal plant of its own and therein provided for the removal and relocation of poles and other property in the public streets of the city belonging to the Gas Company when necessary in order that the city might locate and construct and maintain its own electric light system provided for by the ordinance. This ordinance declared the city's system was necessary for the public peace, health and safety.

Suit was begun by the Gas Company in the District Court of the United States, Southern District of California, to enjoin the execution of the ordinance providing for the municipal electric street lighting system in

such way as to trespass upon the Gas Company's lighting system. This court, at pages 38 and 39 of the report, in discussing the question whether the city acted in its governmental, public capacity, or in its proprietary, private capacity, said:

> "The difference in the capacities is recognized and the difference in attendant powers pointed out in decisions of this court."

This court held in the case that the construction by the city of its municipal electric street lighting system was not done in its governmental capacity but in its proprietary or *quasi*-private capacity and that therefore the city was subordinate in right to the Gas Company, which was an earlier and lawful occupant of the field, and it was also held that the city could not consistently with Section 1 of the Fourteenth Amendment to the Constitution as a matter of public right, clear a space for the construction of its own street lighting system by removing or relocating the instrumentalities of the Gas Company's system occupying the public streets under the franchise granted by the Constitution, without compensating the Gas Company, owner of such system, for the rights appropriated.

Russell vs. Sebastian, 233 U. S. 195; 58 L. Ed. 912;

Vilas vs. Manila, 220 U. S. 345; 55 L. Ed. 491;

New Orleans Gas L. Co. vs. Drainage Commission, 197 U. S. 453; 49 L. Ed. 831;

Vicksburg vs. Vicksburg Water Works Co., 206 U. S. 496, 508.

In the *Vicksburg* case the state laws of Mississippi permitted a municipality to make a contract with a Water Works Company, fixing maximum water rates to private consumers for thirty years, and a contract was entered into between the City of Vicksburg and the Water Works Company to supply water to the people for that period at rates prescribed in the contract. Thereafter the legislature passed an Act authorizing the city to build a water works system of its own for supply of the city and its inhabitants. Thereafter an election was held in Vicksburg under the statute which resulted in a vote to build or buy a water works plant of its own. The city repudiated any contract relations with the company and thereupon a suit was started to enjoin construction of the plant. The Vicksburg Water Works Company prevailed in the litigation and Mr. Justice Day, writing the opinion, at page 508 thereof said:

> "That a state may in matters of proprietary rights exclude itself from the right to make regulations of this kind or authorize municipal corporations to do so when the power is clearly conferred, has been too frequently declared to admit of doubt."
>
> Los Angeles vs. Los Angeles City Water Works Co., 177 U. S. 558: 44 L. Ed. 886;
> Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 7: 43 L. Ed. 341, 344;
> New Orleans Water Works Co. vs. Rivers, 115 U. S. 674: 29 L. Ed. 525.

The difference between the public and proprietary or private capacity of the state is also distinctly recognized and declared in the case of *Railroad Company vs.*

The State, 85 O. S. 251. This is shown by the first and second paragraphs of the syllabus in the report of the case, which are as follows:

> "1. In conducting transactions with respect to its lands the state acts in a proprietary, and not in a sovereign capacity, and being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains.
>
> 2. When land is granted to a city upon a valuable consideration to be used for streets and other purposes, the title will not, in the absence of an express stipulation to that end, revest in the grantor because the land is subsequently used for street and railroad purposes."

This case is quoted with approval by the Supreme Court of Ohio in the *Middletown* case. The facts briefly stated were that prior to April 29, 1872, Ohio was the owner in fee and in possession of a strip of canal land averaging about 100 feet in width and being about 2⅞ miles in length, in the City of Cleveland, constituting the north portion of the northern division of the Ohio Canal. On that day the General Assembly passed an Act (69 O. L. 182) quoted in full in the report of the case, entitled "An Act to authorize the City of Cleveland to enter upon and occupy a part of the Ohio Canal."

Section 1 in substance enacted that the city should be authorized

> "to take, enter upon, improve and occupy as a public highway, or for other purposes, and for laying therein gas and water pipes, and for sewerage purposes, as the city council of said city may determine,"

the strip described,

"but said grant shall be made subject to all outstanding rights or claims, if any, with which it may be in conflict."

The entire public works of the state were at this time under lease to private individuals in pursuance of the Act of 1861 hereinabove referred to.

Section 2 of the Act of April 29, 1872, provided that Cleveland should be liable for all damages consequent upon the vacation and abandonment of the land covered by the Act, and it required Cleveland to deposit with the governor a written release executed by the lessees of the public works relinquishing any rights they might have in the part so abandoned if Cleveland should see fit to occupy such part. It also required Cleveland to deposit a bond securing the performance of an agreement by the city stipulating what it should do as a consideration for the permission to occupy the land, and the Act required that as such consideration the city, before taking possession of the canal or disturbing the use thereof for canal purposes, should at its expense under the direction of the board of public works connect said canal with the Cuyahoga River at the southerly terminus of the portion so to be occupied by the city, procure the right-of-way, make the necessary excavations, embankments, walls, gates and locks needed to connect said canal with said river at the point aforesaid, and remove the present weigh-lock to such place as should be named by the board of public works. (See 85 O. S., pages 253, 254.) The Act further provided that when the city should perform these prescribed duties, the governor should execute and deliver to Cleveland a grant of all the interest of Ohio in said Ohio Canal as above described to be forever used

and occupied by said city for any or all of the purposes before mentioned.

The facts as stated in the report show that the city did perform all of the work above designated (page 265) at a cost of $280,000.00, and that in October of 1879 the governor executed a deed granting to Cleveland the right to use and occupy said lands as its council should determine for any and all of the purposes mentioned upon the terms and conditions of the Act. The city thereafter leased this land to the railroad company and received a consideration of $265,000.00 therefor. In September, 1908, the state instituted action in *quo warranto* to oust the railroad company from further exercise of the alleged right to maintain their tracks upon the property in question. The decisions in the lower courts were in favor of the state, but those decisions were reversed by the Supreme Court of the state as shown by the holdings of that court in the paragraphs of the syllabus quoted above. The opinion was written by Judge Shauck, and at page 298 of the report he says:

> "The making of that substituted connection was a valuable consideration for the grant. It is not intimated that the state was in any way defrauded or even that the legislature exercised an erroneous judgment upon that subject, and yet it is insisted that the state, retaining all that it received in the way of consideration for the grant, may revoke the grant."

In showing the rule which has always been applied by the courts in the construction of grants from the state to individuals in cases of consideration moving from the grantee and in another class of cases where no consideration does so move but the grant is a grant of gift, he

quotes the language of Mr. Justice Story in his dissenting opinion in the case of *Charles River Bridge vs. Warren Bridge*, 11 Pet. 420, 597; 9 L. Ed. 844, as follows:

> "But what, I repeat, is most material to be stated, is that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorable to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract."

It seems to be settled, therefore, that under the decisions of the Supreme Court of Ohio, when navigation ceased on the Miami and Erie Canal, Ohio owned that property in its proprietary or private capacity, and by reason thereof it became subject to the rules declared in the case just considered above and in the *Middletown* case sanctioning and approving the case involving the Cleveland property.

e. *Earlier Cases Distinguished From Middletown Case;* We have said that the *Hubbard, Elevator Company, Vought, Walsh* and *Fox* cases were wholly different in their facts from the facts of the instant case. In each of those cases navigation was still being carried on from the City of Cincinnati to Toledo. The southerly end of this canal in Cincinnati was abandoned by the Act passed in 1863. (Appendix, Paragraph 32, page 221.) This Act was

construed in the *Elevator Company* and *Fox* cases. The northerly end of this canal in Toledo was abandoned by the Act passed March 26, 1864. (Appendix, Paragraph 33, page 223.) This Act was construed in the *Hubbard* case. It will be seen by an examination of these cases that in each one of them the plaintiff had a lease simply permitting him to take a certain amount of water from the Miami and Erie Canal prior to the abandonment Act affecting him. It is clear from a reading of these cases that the only obligation which lay upon the plaintiff in any one of them was the matter of paying to the state the agreed rentals specified in the particular lease, and the Supreme Court of Ohio in each of these cases held that each of the plaintiffs was merely a licensee entitled to take the amount of water from the canal as specified in his lease within such time as the particular part of the canal from which he took the water should be maintained for navigation, notwithstanding the fact, it is true, that the Acts of 1830 and 1840 granted to the board of public works power to sell or lease lands along and waters from this canal for hydraulic purposes upon such conditions as the board might impose and for a limited number of years, or in perpetuity, for an annual rent or otherwise as the board might deem for the best interests of the state. The court in each of these cases assigned as the reason for this rule the fact that if the court should have held otherwise, then the state would have been compelled to maintain at its own expense the portions of the canal so abandoned simply for the purpose of furnishing hydraulic power to the lessee. This shows clearly that the cost and expense of maintenance of the canal or part thereof from which the water was per-

mitted to be taken had not been laid upon the lessee in those cases. In addition, however, in the *Fox* case the Supreme Court held that Fox had no lease because he had abandoned the same and was not entitled to consideration for that reason.

The cases of *Vought and Walsh vs. C. H. V. Railway Company*, 58 O. S. 123; 176 U. S. 478, did not involve any part of the Miami and Erie Canal. They involved a part of the Hocking Canal which formed a part of the southern division of the Ohio Canal. The northern division of the Ohio Canal extended from Lake Erie in Cleveland south to the Town of Dresden on the Muskingum River. The southern division of the Ohio Canal extended from the Town of Dresden on the Muskingum River south along or in the Muskingum River to the Ohio River. A branch of this southern division extended from the Town of Dresden westerly to Lockbourne, just south of Columbus, Ohio, and another branch extended from Lockbourne directly south to the Ohio River at Portsmouth. The Hocking Canal, a part of the southern division, extended along the Hocking River and in between the Muskingum River and the branch of the southern division extending from Lockbourne south to the Ohio River.

There must have been some navigation on the southern division of the Ohio Canal when the *Vought* and *Walsh* cases arose and were decided in 1898 because Section 3 of the Act of 1902 (Appendix, Paragraph 42, page 246) provided that

> "The waters, supplies, reservoirs, dams, feeders and adjacent lands thereto of the southern division of the Ohio Canal from Dresden Junction to Lockbourne and from Columbus to Portsmouth shall be retained and maintained."

It further provided that the governor should appoint a board of commissioners to investigate

> "the conditions of the southern division of the Ohio Canal and all the facts bearing on the question of its improvement, maintenance, its present and future usefulness as a canal, together with all possible information bearing upon this subject, and report the same, together with recommendations, to the next General Assembly, *pending which report the same shall be kept open for navigation.*"

The Miami and Erie Canal was a distinct line of canal and was not connected in any way with the northern or southern divisions of the Ohio Canal. The *Vought* and *Walsh* cases, therefore, have no bearing upon the *Middletown* case, which applied to and involved only the Miami and Erie Canal.

As to appellee's contracts, however, a very different state of facts present themselves. Navigation on the Miami and Erie Canal had practically disappeared prior to the year 1894, and therefore before appellee's principal lease, the Law lease, was written and before appellee acquired that lease with the express consent of the board of public works, navigation had wholly disappeared from the Miami and Erie Canal and it has never been revived. That was practically thirty-five years ago.

The Law lease lays upon the lessee the entire cost and expense of maintaining the part of the canal in question here from the point where it connects with the Maumee River above the Grand Rapids Dam northeasterly to Lock No. 45, about three-fourths of a mile northeasterly of the hydro-electric plant in Maumee. Under this lease appellee, at its own expense, is required to keep in

good order and repair and free from obstructions, all parts of this canal, including the banks, and all devices and works thereof, and in connection therewith and this, of course, includes the Grand Rapids State Dam. After acquiring this lease appellee constructed the water flume from the canal in Maumee southerly to the Maumee River suitable for a hydraulic plant of 400 horse power; acquired land at that point on the river to construct such a plant and thereafter constructed the plant.

Under this lease appellee was paying the state a rental of $500.00 per annum. Thereafter in 1902 the General Assembly passed the Act hereinabove referred to of that year in which in Section 4 thereof (Appendix, Paragraph 42, page 246), the General Assembly of Ohio authorized and commanded the board of public works and the canal commissioners to

> "investigate all present water rate contracts on the two lines of canal mentioned in Section 1 and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future," the Miami and Erie Canal being one of the canals mentioned in "Section 1."

The Law lease granted to appellee:

> "The use and occupation of all the surplus water of the Miami and Erie Canal between Providence and Toledo not needed for navigation or not now under lease."

After passage of the Act of 1902, appellee acquired the Tryon lease in 1904 granting 58 horse power of water at a rental of $300.00; the Detwiler lease in 1909 granting 40 horse power of water at a rental of $320.00; and in 1910 the reserved water rights under the Purdy per-

petual grant securing to appellee the water reserved in that grant. (Stipulation Exhibit No. 7; R. 82, 95, 101.)

In the month of December, 1910, after the passage of the Act of 1902, appellee entered into the agreement supplementary to the Law lease (Stipulation Exhibit No. 2), under and through which the whole situation between the state and appellee with respect to appellee's water power at Maumee was revised and readjusted, thus forming between the state and appellee a definite plan for this great water power. In that supplementary agreement appellee reassumed the entire maintenance of this canal throughout Lineal Part 2 and the southwesterly end of Lineal Part 1 to Lock 45 and assumed the payment of the wages of three patrolmen to be appointed by the state to guard and protect this property and keep the same in proper repair.

In addition to the above, however, appellee in this agreement agreed to and did dredge this canal throughout its length from the Maumee River at Providence to Lock 45 in Maumee, remove the rock bars obstructing the flow of the water therein and raise the banks of the canal so that it would carry a greater quantity of water.

Appellee's improvement in this way of the state's property was done according to the agreement and at the sole cost and expense of appellee for this work alone of the sum of $53,000.00.

Through this supplementary agreement the state agreed to let into the canal from the pool above the dam in the Maumee River all the water that the canal would safely carry to be used by appellee at the hydro-electric plant in Maumee in the generation of electricity to be supplied to the public for light, heat and power.

Under this agreement the rentals to be paid by appellee were increased $1,500.00 per year absolutely in addition to the rentals called for by the Law lease and increased to an additional $1,500.00 per year if the state should furnish an amount of water without interruption as specified in the agreement.

Immediately upon the acquirement of this supplementary agreement appellee completed the work of the improvement of the state's property as called for by the agreement and thereupon enlarged the water flume from the canal southerly to the hydro-electric plant on the river, to a great flume about 300 feet long, 50 feet across the top, 40 feet across the bottom and 12 feet deep. It, as a part of this flume, laid large iron pipe flumes connecting with the one first described above and descending to the hydro-electric plant, carrying the water in a fall of 61 feet. At the same time appellee enlarged the hydro-electric plant from its former capacity of 400 water horse power to 2700 water horse power with capacity for generating 10,000,000 kilowatt hours of electricity per year, and it installed in the plant in this work modern turbine water wheels, electricity generators and all other equipment necessary to the construction and completion of such larger plant. (Stipulation Exhibit No. 24, R. 168). This work was all done with the knowledge and consent of the state and the plant has been thus operated since such completion and has generated electricity for the purposes aforesaid since such completion. (Stipulation Exhibit No. 14, R. 127.)

After the completion of this plant appellee acquired the Studer lease (Stipulation Exhibit No. 3) in 1913, granting 47 horse power of water at a rental of $450.00

per year, and The Maumee Paper Company lease (Stipulation Exhibit No. 5) in 1912, granting 52 horse power of water at a rental of $400.00 per year. Each of these contracts, the same as the Law lease and its supplementary agreement, imposes upon appellee the entire cost and expense of the canal and all devices and works in connection therewith used in operating the leases.

The detail of terms, provisions and conditions of all these minor leases, except the Purdy grant, have heretofore been shown in the statement of the case.

f. *Detail of the Purdy Grant*: The Purdy grant, Stipulation Exhibit No. 7 (R. 101), was overlooked in the drawing of the bill, and it is brought into the case through Section 4 of the stipulation and agreement between the parties on the evidence and Section 15 of that Stipulation (R. 60, 64). This grant arose out of circumstances and facts as follows:

Prior to March 12, 1845, James Purdy, of Mansfield, Ohio, was the owner of a body of land bounding and abutting on the Maumee River at the Grand Rapids, so-called, thereof, at the Town of Gilead, now the Village of Grand Rapids, Ohio, and at the location of the present Grand Rapids State Dam. By virtue of his ownership of this land he was, of course, a riparian owner on the south side of the Maumee River, and on the land and the river at Gilead, as shown on Stipulation Exhibit No. 25, map of the canal, he had erected and was operating a mill by hydraulic power through water drawn from the south side of the river. At this date Ohio had completed the Wabash and Erie Canal (afterwards designated as a part of the Miami and Erie Canal) from the west Ohio

state line northeasterly to Defiance and on northeasterly along the northerly side of the Maumee River to and through Toledo to Lake Erie in Lucas County. Purdy's hydraulic power was then in existence at Gilead on the south side of the river. During the construction of the canal on the north side of the river the state had constructed the Grand Rapids State Dam running from the north side of the river at Providence to a point on the south side of the river above the location of Purdy's hydraulic power and his mill. Question arose between Purdy and the State of Ohio relative to Purdy's hydraulic power on the south side of the Maumee River, and on March 12, 1845, the General Assembly passed a special joint resolution (Appendix, Paragraph 40, page 241) relative to adjustment of the claim of James Purdy with respect to his water power. This joint resolution gave the board of public works authority

> "to negotiate and purchase of James Purdy the right to which he may be entitled as riparian proprietor to the water which the state may want, flowing in the Miami (Maumee) River at the Grand Rapids, *over* and *above* what she may need for the purposes of the improvement of navigation by her public canals; and in case the said Purdy shall desire to receive the price agreed on in whole or in part in the surplus water of said river, the board shall construct a side-cut from the pool above the State Dam *sufficiently large for the purposes of navigation* and to carry the water to the mills of said Purdy with a suitable guard lock therein, which side-cut shall be *under charge of the board of public works and subject to reasonable tolls*";
>
> "And the board may sell to said Purdy to be taken through such side-cut so much water as shall be agreed on so that there shall at all times

remain to the state water enough for her purposes of *navigation* and to *supply the hydraulic power* which she shall have rented; and any balance due to said Purdy by said agreement shall be paid as damages to others are paid by existing laws for injuries occasioned by construction of the public works."

On December 8, 1845, Purdy executed and delivered and the state received and recorded in Wood County, Ohio, the indenture, copy of which is Stipulation Exhibit No. 7 (R. 101). The preamble of this indenture recites that the state in construction of the canal on the north side of the river had erected a dam across the river a short distance above the property and hydraulic power of Purdy situated on the river for the purpose of diverting the water into said canal as well for navigation as to lease the same for hydraulic purposes, thereby diverting the water from the natural channel and from the hydraulic works of Purdy. The granting clause of this indenture is:

"That the said Purdy for the consideration hereinafter stated releases and forever quitclaims to the State of Ohio, her lessees and assigns, his right and interest as riparian proprietor to the use of the water in the Maumee River flowing over the Grand Rapids, over and alongside of his property in and near the Town of Gilead, in Wood County, Ohio, that is, so much thereof as said state may choose to divert and *lease for hydraulic purposes*, provided that said Purdy reserves and *excepts* from said conveyance and reserves to his own use so much of said water to be taken from the pool of the dam aforesaid through the canal herein described in any quantity he may desire," during certain times of the year and in certain amounts, all of which are then described.

> down to a minimum amount of water, "sufficient to operate six pairs of four and one-half feet millstones, grinding each at the rate of 150 bushels of wheat per 24 hours, together with all machinery necessary in manufacturing flour," etc.

Through the indenture the state, in consideration of the above, agreed to construct a public navigable canal from the pool of the river aforesaid on the south shore of the river to the head of Purdy's mill race in the Town of Gilead and then through that mill race to a point 200 yards below the head thereof and to his mill, 30 feet wide at the bottom and 4½ feet deep below the top of the dam with proper descent at the bottom and proper slope of the banks, and to construct in said canal a guard gate and other fixtures for the security of the navigation and machinery connected with the canal; and

> "The said State of Ohio conveys and guarantees to said Purdy and his assigns forever the right to receive through said canal and use on his own land the foregoing reserved quantity of water."

The state also agreed in this grant to lease no water on the canal on the north side of the river between the pool and the Town of Waterville in addition to that which was then leased, and none on the canal on the south side of the river except what was to go to Purdy under the indenture.

This grant and the rights of Purdy under it and all the circumstances out of which the grant arose, are really parallel with the facts in the *Middletown* case. In this latter case Enoch deeded land to the state to be used in construction of the Middletown feeder and parts of the

canal there, but in his deed expressly reserved his water rights which he had theretofore been enjoying at that point.

The state constructed the navigable canal on the south side of the river, as above provided, through and occupying Purdy's head race on his own lands. The state therefore acquired this land for this south side navigable canal in fee simple, subject only to the right of Purdy to carry the reserved and excepted amount of water specified in his grant to his mill to be used for hydraulic purposes.

This plan accomplished exactly what was accomplished under the plan followed between Enoch and the state in the *Middletown* case.

The board of public works and the General Assembly no doubt considered the joint resolution in question here necessary because the Wabash and Erie Canal (afterwards Miami and Erie Canal) had already been located and constructed on the north side of the river under former enabling acts. (Appendix, Paragraph 22, page 213.)

Appellee acquired the excepted and reserved water rights of Purdy under the Purdy grant in April, 1910, with the consent of the State of Ohio, and in Section 15 of the Stipulation and Agreement on the Evidence (R. 64) it is agreed that since such acquirement by appellee none of the reserved and excepted water under the grant has been taken out of the pool in the Maumee River on the south side thereof but that all of such reserved and excepted water has been and is being diverted in said pool and taken out by appellee on the north side of the river and carried through Lineal Part 2 and

the southwesterly 1.6 miles of Lineal Part 1 to the plant in Maumee. This diversion and use is authorized under the *Middletown* case, 114 O. S. 438, 457, as ruled in the third paragraph of the syllabus, as follows:

> "3. Where water rights are granted for a specified use, or are excepted from a grant for a specified use, in the absence of an expressed intention that the grant or the limitation are for no other use, the specification of the use will not be regarded as a limitation of the character of the use, but only as a limitation of the quantity of the use."

On the trial of the instant case in the court below counsel claimed that the Purdy grant was nothing more than an ordinary lease or sale of water by the state to Purdy differing in no respect in effect from appellee's other contracts. But Purdy never granted to the state all of the water he was entitled to by virtue of his riparian ownership and of course the state never paid him for all of it. It must be presumed that such water as the state took from him for navigation purposes was paid for under the Act of 1825. The resolution provides for that. As a consideration for the water which he granted to the state for the state to use for its own hydraulic purposes on the north side of the river, the state constructed the navigable canal on the south side of the river through Purdy's head race on his own land, and according to the terms of the grant, Purdy, his heirs and assigns, are entitled to draw that amount of water from the south side of the river through said canal in perpetuity.

This is the construction put upon the resolution and the Purdy grant since it was entered into between the

state and Purdy in 1845 and it clearly is ruled by the *Middletown* case.

If counsel fears that appellee claims the right to use the water excepted and reserved by the Purdy grant in perpetuity on the north side of the river in the Miami and Erie Canal, we answer that we make no such claim. None of appellee's contracts run in perpetuity with respect to the Miami and Erie Canal on the north side of the river. The Purdy grant was acquired by appellee with the knowledge and consent of the state simply for the purpose of consummating the situation and plan desired by both the state and appellee, namely, to use all the water that could flow in the Miami and Erie Canal to its safe capacity from the pool above the Grand Rapids Dam to the hydro-electric plant, except the water going into the Milling Company in Toledo and to the Providence Mill at Providence. That result was accomplished when appellee acquired the Law, Studer, Tryon, Maumee Paper Company and Detwiler leases and the Purdy grant and readjusted the whole situation under the agreement and supplementary lease.

Appellee, except for its arrangements with the state of Ohio, could exercise in perpetuity the rights now owned by it under the Purdy grant on the south side of the river, but under the holding in the *Middletown* case it has the right to use the water secured to it under the Purdy grant through and on the canal on the north side of the river so long as it is lawfully entitled to use the canal lands and water therefrom of the Miami and Erie Canal on the north side of the river. The length of time throughout which it may thus use water from the Purdy grant is measured by the terms of appellee's other con-

tracts and the facts, circumstances and law governing its rights against the state under those contracts, including the agreement and supplementary lease. When appellee's rights to use the Miami and Erie Canal lands and draw water through and from the same on the north side of the river shall be terminated, then its right to use water from the Purdy grant through and from that location will also be terminated.

Counsel for appellants, arguing further with respect to the Purdy grant, contended in the court below that

> "The so-called reservations do not purport to be an exception or even a reservation of anything which was in existence at the time of the grant."

Certainly the facts of the case as related above cannot be disputed. They are established by the wording of the resolution and the grant themselves. The mere reading of the language refutes the claim of counsel in this respect and the *Middletown* case establishes the correctness of the construction we place upon it.

On the trial in the court below counsel for appellants on the question here under consideration relied on the case of *Yorkhaven Water & Power Co. vs. Yorkhaven Paper Co.*, 201 Fed. 270. This case is of no benefit to appellants because it is not in its facts at all like the instant case. It arose out of a controversy between two corporations, one a private corporation and the other a *quasi* public corporation. The Paper Company was a land owner on the Susquehanna River and therefore a riparian owner. The Paper Company sold its entire tract of land thus bounding and abutting on the river to the Power Company, with all water rights except as reserved in the selling grant. The Paper Company was not in the

exercise of any water power at the time of the transaction and in fact there was no water power then in operation, or in existence. The Paper Company either retained or already owned a tract of land far removed from the river, and in making this sale of its riparian land it was provided that the purchasing Power Company should create a water power at some point on the river and make arrangements to flow a certain amount of water forever to the Paper Company on its land far removed from the riparian land, as described above. The agreement between the parties provided that if the Power Company should ever fail to furnish the amount of water stipulated for in the agreement, then damages should be paid by it to the Paper Company for such failure. The Power Company was a *quasi* public corporation using water power in connection with the riparian land which it had purchased, as stated above, from the Paper Company in the generation of electricity, which was supplied to the public for light, heat and power purposes. It appears from the facts of that case that if the Power Company should continue to furnish water to the Paper Company for hydraulic power, the Power Company would not be able to operate its hydro-electric plant and fill its contracts for electricity to the public, and it further appeared that if it should attempt to do so, the Power Company would be made insolvent and could not go on with its business at all. The court held that under those circumstances even an injunction should not be granted, but the court further held that it was a complete defense to the suit for injunction that the agreement provided an adequate remedy at law to the Paper Company, in that it was provided in the agreement that if the Power

Company did not furnish the water to the Paper Company for hydraulic power, the Paper Company would have its action for and could collect damages for such failure. We fail to see how this case can be of any comfort to counsel for appellants in the instant case.

g. Right of State to Abandon Without Compensation Not Stare Decisis: In the court below appellants contended that:

> "The power of the state to abandon the part of the canal in question here has become *stare decisis.*"

Thus broadly stated, counsel for appellee emphatically dispute the proposition.

We have at all times insisted that the *Hubbard, Elevator Company* and *Fox* cases and other similar cases on which appellants rely must be construed as applying only to the specific facts of those cases respectively.

We have always contended that the facts and circumstances of appellee's contracts are wholly different from any and all the cases upon which appellants rely, and that if the *Middletown* case had never arisen, then and in that event even all the equities in such a controversy as this would be with the appellee and the court would be bound to recognize those equities and enjoin the state authorities from taking the water away from appellee until the state should have made proper compensation to appellee for its property rights. We made this claim in the case of *The Maumee Valley Electric Company vs. Toledo*, 13 Fed. 2d 98, on the theory and ground and fact that navigation on this canal had been wholly abandoned before appellee acquired any of its contracts and that the state had passed from the owner

ship and control of these lands in its public or governmental capacity to ownership in its private or proprietary capacity, and that in dealing with them the state must be governed by the same rules as govern private individuals in like transactions.

Then, on that particular question, which as Judge Robinson said was then to be decided for the first time with respect to the Miami and Erie Canal property, came the *Middletown* decision which fully sustains and confirms our claim with respect to the property in question and the facts of the instant case. The United States Circuit Court of Appeals, 13 Fed. 2d 98, 102, *supra*, in their opinion said it was unnecessary for that court in that case to decide the immediate question now being discussed, but that since that case had been argued the *Middletown* case had been decided and that that case does lend substantial support to the proposition for which we contend.

The rule in Ohio that the state with respect to the canal and waters therein of the Miami and Erie Canal had passed from its public governmental capacity in the ownership thereof to its private and proprietary capacity in such ownership, was established in the *Middletown* case and is *stare decisis*, and therefore rules the instant case in favor of appellee because the facts on that question in that case and in the instant case, as made by the pleadings and proof, are the same. Counsel for appellants did not meet the questions of difference in facts between the cases on which they rely and the instant case; they did not even discuss those differences although they of course knew them full well.

The power of the State of Ohio as an abstract prop-

osition to abandon any canal in a proper case has never been disputed by anybody so far as we are advised, and it certainly is not disputed by us; but the rules declared in the earlier cases cannot stand as *stare decisis* controlling the instant case growing out of facts and circumstances wholly and essentially different from the facts and circumstances of any of those cases. So that the power of the state to abandon any canal as an abstract proposition is not the question here.

The question here is: Does the state under the facts and circumstances of the instant case have the power to abandon this canal for hydraulic purposes, take the water out of the same, deprive appellee of the use of these canal lands and the water therein under its contracts and leave appellee wholly without remedy against the Act, the enforcement of which appellee in this suit seeks to enjoin? If counsel claim that the power of the state is so broad as that, then we say the question has not become *stare decisis*. No case has been decided on a state of facts and circumstances such as are involved in the instant case. It is true that *stare decisis* is

> "To abide by or adhere to decided cases,"

where the same points come again in litigation under the same or similar facts and circumstances. But it was decided long ago by this court in the case of *Brooks vs. Norbury*, 11 Wheat. 80, 90, 91; 6 L. Ed. 423, 426, that a decision or

> "opinion in a particular case founded on special circumstances, is not applicable to cases of circumstances essentially different."
>
> Northern Pacific Railway Co. vs. North American Telegraph Co., 230 Fed. 347, 359, 360.

It has never been decided by any court that any rule of law declared in any case upon a particular state of facts would or should stand as *stare decisis* in another case based upon facts and circumstances essentially different from those in which the rule in question was established. This is elementary, especially in equity jurisprudence, and we deem it unnecessary to burden the court with the hundreds of cases which might be cited in support of our statement.

Further, counsel in the court below attempted to apply to the controversy here the case of *State ex rel. vs. Board of Public Works*, 42 O. S. 614. That case was not only wholly unlike the instant case but wholly unlike any of the other cases upon which they relied. That was the case of a lease in which a reservation clause had been inserted in accordance with Section 6 of the Acts of 1830 and 1840 giving power to the board to make leases. This Section 6, still in force, provides that every lease must contain a reservation that if the state or its agent should at any time deem it necessary to resume the use of the water leased and use it in the interest of *navigation*, then such resumption might be had, and the statute further provides that in case of such resumption in whole or in part, the sum paid for the lease by the lessee or the rent reserved or a reasonable portion thereof should be refunded or remitted to the lessee, his heirs or assigns. The board of public works attempted to go further in the lease in question in that case and provided that in case the board should at any time so resume the water leased, then the board of public works would pay to the lessee the value of any lasting improvement erected for the use of such water.

The State Supreme Court in passing on the case held that the board in attempting to make an agreement that it would pay the lessee for such improvements was going beyond its powers and held that under the statute it was the public duty of the board to resume the water leased at any time when needed for the public use of navigation untrammelled by any condition or any right of the lessee to prevent it.

There are no such facts, circumstances or conditions involved in the instant case. The only thing the state has to do in the instant case is to receive its largely increased rentals of a greatly bettered property made so at the cost and expense of appellee by reason of the contracts in question here.

h. *Consummation of Plan by State for Great Water Power at Maumee*: Now after the acquirement of appellee's principal lease, the Law lease, Stipulation Exhibit No. 1, laying the entire cost and expense of maintenance of the entire canal in question here upon appellee, free of cost and expense to the state; after the passage of the Act of 1902 giving express authority and commanding the board of public works to readjust and revise all water contracts on the Miami and Erie Canal; after acquirement by appellee of the Tryon lease in 1904, the Detwiler lease in 1909, the acquirement of the excepted and reserved rights under the Purdy grant in 1910, and the making of the supplementary lease and agreement between appellee and the state direct under which appellee's contracts acquired up to that time were revised and readjusted in pursuance of the command of the Act of 1902 and under which supplementary agree-

ment appellee reassumed the entire cost and expense of complete maintenance of the canal in question here, free of cost and expense to the state, and in addition thereto actually improved this property of the state by removing rock bars and other obstructions from the canal and raising its banks, deepening and widening the same throughout Lineal Part 2 and the southwesterly part of Lineal Part 1 to Lock 45, such deepening and widening and raising the banks of said canal costing appellee for that work alone the sum of $53,000.00, appellee then in accordance with the plainly evident plan between the state and appellee acquired the Studer and Maumee Paper Company leases.

This consummated the plan between the state, acting through its board of public works, duly authorized under the Statutes of 1830, 1840 and 1902, and appellee to create a water power at the Village of Maumee, Ohio, to the operation of which there should be devoted all the water that the canal would carry to its safe capacity, to be drawn from the pool of the Maumee River above the Grand Rapids State Dam down through Lineal Part 2 and the southwesterly end of Lineal Part 1 to the hydro-electric plant constructed there by appellee for the use of the water, except such water as is used under the Peter Minor perpetual grant in operating the Providence mill at Providence, and the water used under the contract with The Toledo Grain and Milling Company in the operation of its mill at the north end of Lineal Part 1 on Swan Creek, the Milling Company contract being Stipulation Exhibit No. 10 (R. 116).

The Peter Minor perpetual grant appears in Stipulation Exhibits Nos. 8 and 9 (R. 104, 110). This is the

grant involved in the case now before this court of *Kirk et al., Appellants, vs. The Providence Mill Company, Appellee*, Case No. 675, October Term, 1928, and this grant in its circumstances is parallel to the facts of the *Middletown* case and the Purdy grant in the instant case.

The Acts of 1830 and 1840 were in full force before the conception of the plan, and they remained in full force to the year 1917. Under their terms they expressly authorized the board of public works to sell or lease lands along and water from this canal for a *limited number of years* or in *perpetuity* for hydraulic purposes if not needed for *navigation*, upon such conditions and reservations as the board might consider necessary and proper for a certain annual rent or *otherwise* as they might deem most beneficial for the interests of the state. They were amended in 1917 only by provision that thereafter such contracts should be made for a term not exceeding twenty-five years. Appellee's contracts were all written under those statutes except the lease and agreement supplementary to the Law lease, which was written under those statutes *and* Section 4 of the Act of 1902 authorizing and commanding the board of public works to revise and readjust all such contracts then in existence on this canal for the future running of the terms of such contracts.

Navigation on this canal had wholly disappeared some years before the passage of this Act of 1902 and yet the General Assembly of Ohio did not repeal or limit the power granting statutes of 1830 and 1840 in any respect. On the contrary, the Act of 1902 in effect recognizes, ratifies and confirms all such contracts with respect to this canal written under those early laws of 1830 and

1840 and commands a readjustment of such contracts for the future running of their terms. The execution and delivery of appellee's agreement and supplementary lease and the performance by appellee of its obligation thereunder assumed, greatly to improve this property of the state at great cost to appellee, effected such readjustment and revision of all appellee's contracts with the state.

The statutes of 1830 and 1840 do not require the consideration moving from the lessee for the lands or the water to be only an annual money rent but such consideration may, under the terms of these Acts, be a certain annual rent *or otherwise*. Under these statutes and the Act of 1902 the state, through its board of public works, exacted not only largely increased annual rentals in money from appellee but required it to assume the entire cost and expense of the maintenance of this canal, including its banks and all devices and works in connection therewith, from where it connects with the Maumee River above the Grand Rapids State Dam northeasterly throughout Lineal Part 2 and the southwesterly portion of Lineal Part 1 to Lock 45, and in addition to the above, required appellee greatly to improve this property of the state in the manner and at the cost heretofore stated.

As further conclusive evidence of the conceived plan heretofore mentioned, we here call attention to the fact that the water reserved under the Purdy grant was to be used, according to the terms of that grant in operating a water power on the south side of the river at Grand Rapids; the water to be used under the Studer lease was to be used in a water power at Waterville, Ohio, on Lineal Part 2, six miles up the river from the hydro-electric

plant, and the water to be used under the Tryon and Maumee Paper Company contracts, respectively, was to be used at different points in the Village of Maumee but above and southwesterly from the hydro-electric plant on Lineal Part 1; the water to be used under the Detwiler lease was to be used above Lock 45 at such point as the parties or their assigns might agree upon, on Lineal Part 1.

Under the readjustment, therefore, through the agreement and supplementary lease, it is plain that the state meant to permit appellee to bring all the water called for by the Purdy grant from the pool of the river above the dam down throughout Lineal Part 2 and Lineal Part 1 to the hydro-electric plant and that it meant also to permit appellee to bring the water called for by the Studer lease from Waterville down to the plant, and the water called for by all the other minor leases over this property from the points where they were originally intended to be used to the hydro-electric plant, thus giving to appellee an easement and right-of-way over all of Lineal Part 2 and the southwesterly 1.6 miles of Lineal Part 1 for the carriage of all this water from the pool of the river above the dam.

Appleby vs. N. Y., 271 U. S. 387, 388: 70 L. Ed. 1002;
Middletown case, 114 O. S. 438, 457.

Of course it was known to the state when the Act of 1902 was passed that navigation on this canal had disappeared years before and that it never could be revived and under these circumstances we cannot reach any other conclusion but that the General Assembly in passing the

Act of 1902 must have intended to give the board of public works authority to and contemplated that it would or might turn this whole canal, waters in the pool above the dam, the dam itself, the canal lands and all works and devices thereof, over to some individual, persons or corporations in practically the same way in which the whole public works were turned over to lessees under the Act of 1861.

Reading the Acts of 1830 and 1840 together with the Act of 1902, in view of the fact that the former Acts were never amended until 1917 and then only as to the time to run of such contracts, we cannot escape the conclusion that the General Assembly, sensible of the fact that navigation on this canal had ceased never to be revived, purposely allowed the earlier power granting Acts to stand in their broad terms, recognized, ratified and confirmed all contracts written under them with respect to this canal and permitted the board of public works through the power granted in Section 4 of the Act of 1902 to revise and readjust all such contracts so as to bring to the state the best possible results that could be secured through such readjustment.

The Milling Company lease, Stipulation Exhibit No. 10 (R. 116), lays upon the Milling Company the duty and obligation of maintaining the canal as used by it, free of cost and expense to the state.

The sum total of the situation therefore is that under these statutes the state has leased this canal to appellee and the Milling Company as completely and to the same effect as it leased the entire public works under the Act of 1861. It thus has dealt with these lands in its propri-

etary or private capacity in the same way that it dealt with the lessees of the public works with respect to them.

In deciding the *Hubbard* case, 21 O. S. 379, the Supreme Court of Ohio declared that the state had acted in its private capacity when it leased the entire public works to individuals. The court does this in plain language on page 399 of the report, as follows:

> "When the statute was passed authorizing the abandonment of the canal to the City of Toledo, the lessees of the public works were in actual possession of it, under the Act of May 8, 1861, and the lease executed in pursuance thereof, and by which they were empowered to hold, maintain and operate the same, and appropriate its revenues. To this extent, the body of the canal had become, for the time, the private property of the lessees, of which they could not be divested by the state, without impairing the obligations of their contract. This lease was an 'outstanding right and claim' which could not be lawfully defeated by an Act of abandonment, and with which it would necessarily conflict."

Plaintiff Hubbard in that case, according to the decision, was simply a licensee permitted under his lease to take a certain amount of water from the canal before its abandonment north of Lineal Part 1. It appears plainly from the case that he was not under any obligation to maintain the canal and that if the court in that case had held otherwise than it did, then the state would have been compelled to bear the cost and expense of keeping up the canal simply to furnish the water to Hubbard for his hydraulic power. Furthermore, navigation was then in existence on the canal from Toledo to Cincinnati. Appellee, however, under its contracts, stands in a wholly

different relation with respect to this property. It stands in the same position in which stood the lessees of the entire public works. It not only maintains this canal and all the devices and works thereof solely at its own cost and expense but it made a much better property of it through expenditure of its own money to the amount of $53,000.00, all under authority duly given by the General Assembly of Ohio to the board of public works to make such an arrangement, and this after the state had passed from its public to its private capacity in the ownership and control of the property.

In the *Cleveland* case, 85 O. S. 251, the General Assembly provided for a sale of the north 2⅞ miles of the Ohio Canal in Cleveland and as a consideration to move from Cleveland to the state it provided that the city should at its own expense and under the direction of the board of public works connect the canal with the Cuyahoga River at or near the southerly terminus of the portion to be deeded to the city, procure the right-of-way, unless the same should be owned by the state, at the desired locality, make the necessary excavations, embankments, walls, gates and locks needed to connect said canal with said river at the point aforesaid, etc. It was not required to pay any money direct to the state. The Supreme Court of Ohio held that in that sort of a transaction with respect to its lands the state acted in a proprietary and not in a sovereign capacity and that it must be governed by and be amenable to all the rules of justice which it prescribes for the conduct of its citizens and that it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains.

The instant case differs from the *Cleveland* case only

in that instead of getting a title in fee simple to the property here in question, appellee is given complete ownership and control thereof for a period of years and as a consideration therefor it was required to make of the property at its own expense a greatly better property.

Appellee is not seeking in this case to prevent the state from devoting this property to some other use, even a public use. It is only insisting that it entered into valid contracts with the state, the latter acting in its private and not in its sovereign capacity, and appellee insists that if the state now desires to take away all of appellee's rights under those contracts, put it off the property after it has spent a large amount of money in improving the same at the request of the state, then it should be compensated for its property rights under such contracts.

Appellants in the court below contended that the legislative Act in question here is, because of its terms, conclusive that the state had never passed from ownership and control of those lands in its governmental or public capacity to an ownership and control of them in its proprietary or private capacity. They said that was true because the Act declares that the state intends to retain title to this property for the purpose of devoting it to a public highway—not for navigation but for vehicular travel by land. Appellants making that claim made the further claim that since the Act declares that the state intends in the future to devote the property to a public highway, then it was within the power of the legislature acting in its public or governmental capacity to declare all contracts, such as the contracts of appellee, to be null,

void and of no effect, without making any provision for compensation to the owners of such contracts.

The doctrine declared in the *Middletown* case, however, renders such contention wholly untenable. It would not be contended by anybody that the state would be without power to devote this property again to public highway purposes after it shall have extinguished the rights of appellee through regular and lawful procedure, by amicable arrangement or under the power of eminent domain, and through such procedure have given adequate compensation to appellee in exchange for its rights under its contracts. The state, however, will not be permitted to make such contracts with its citizens acting in its proprietary or private capacity and then free itself from its contract obligations by a simple legislative declaratory Act that it means to go back to the ownership of the property in its governmental or public capacity.

i. ***Appellee's Contracts Are Within Protection of Constitution Regardless of the Middletown Case:*** The question here is as to the nature and extent of the right acquired by appellee under its contracts with the state. This question, in view of the fact that appellee is invoking the protection of Section 10 of Article I of the Constitution of the United States, and Section 1 of Article XIV of the amendments thereto, this court will determine for itself.

Bank vs. Skelly and
Appleby vs. New York, *supra*.
Russell vs. Sebastian, 233 U. S. 195, 202; 58 L. Ed. 912, 920.

The court below, discussing the question as to whether appellee's contracts are contracts within the contract and due process clauses of our Federal Constitution (R. 173 to 176), used the following language:

> "The wisdom of the plan conceived by the early fathers of building a system of water highways over the state 'to promote the agricultural, manufacturing and industrial interests of the state' at its formative period, and the operation of the same as a great vehicle of transportation for fifty years, was entirely justified by the unprecedented development and growth of the state and its industries during that time.
>
> The year 1863 marked the beginning of a series of Acts of the General Assembly abandoning various sections of the canal 'for canal purposes.' This legislative surrender of portions of the canal and the authorization of the use thereof for other purposes, gave rise to litigation in connection with the intervening rights of individuals holding water rights.
>
> Navigation was of course the prime object and original main purpose in the building of the canals. It was a public purpose and exercised by the state in its governmental and sovereign capacity. During the time of the operation and use of the canals for transportation purposes, the use of water for hydraulic power purposes was merely incidental and subordinate to the main purpose. It accordingly became the established law, that when it became inexpedient or inadvisable to continue the canal for navigation purposes, or when some other public purpose, though local in nature, became more important, that part so affected might be abandoned without regard to and notwithstanding the water power leases.
>
> Hubbard vs. Toledo, 21 O. S. 379;
> Elevator Co. vs. Cincinnati, 30 O. S. 629;

Fox vs. Cincinnati, 33 O. S. 492: 104 U. S. 783, 785;

Vought vs. Ry. Co., 58 O. S. 123;

Compare, Kaukauna Co. vs. Green Bay, etc., 142 U. S. 254, 282;

Hoagland vs. Ry. Co., 111 Ind. 443.

The sale of surplus water, subordinate in the first instance and for many years thereafter to the primary purpose and use of the canals, gradually became a contributor to the accomplishment of the main purpose of 'promoting the agricultural, manufacturing and industrial interests of the state' in the development of hydraulic power. It becomes obvious that this element of the state's business has become important when we consider that it has gone on without interruption, paralleling the business of navigation until that business outlived its usefulness, and continuing for thirty years thereafter as the chief if not the sole use to which the canals have been put, and returning to the state a revenue of eighteen millions of dollars—nine millions of which were derived from water rentals of the Miami and Erie Canal alone. The revenue itself indicates a business of substantial proportions, to which private capital of necessity was attracted in the building and enlarging of power plants, and in which corresponding property rights and vested interests have become involved.

All the leases herein involved were made pursuant to authority given by Act of the General Assembly in 1840. This statute remained unchanged until its amendment in 1917, and was recognized as meeting all modern requirements by its incorporation in the General Code of Ohio in 1910. Sections 14009, *et seq.*, Ohio General Code; 38 O. L. 87. The leases were also made subsequent to the time that travel and transportation

by canal had become too slow for the then modern conditions. The position of the state had changed from that of operating the canal as a navigable highway, to the operation of a great power plant for the sale of power and water to the public. *State ex rel. vs. The Middletown Hydraulic Co.*, 114 O. S. 437.

Viewed in the light of changed and altered circumstances brought about by modern progress and development, facts and situations basically the same may assume a new and different aspect. The relationship between the state and the lessees and grantees of water rights, in defining their respective rights, may call for solution differently, if the altered or changed condition warrants. When engaged in the business of contracting water privileges for the manufacture of power and energy as a principal business, the state acted in its proprietary capacity. It is a commercial proprietor, bound in its contractual engagements the same as individuals. *State ex rel. vs. Middletown Hydraulic Co., supra.* That a state or subdivision thereof may act in such capacity, and when so doing is amenable to all the rules of law which bound private individuals, is well established in Ohio and elsewhere.

South Carolina vs. U. S., 199 U. S. 437;

Vicksburg vs. Vicksburg Water Works Co., 206 U. S. 496;

Los Angeles vs. Gas and Electric Corporation, 251 U. S. 32;

State, ex rel. vs. Middletown Hydraulic Co., supra;

State vs. Executors, 3 O. S. 309;

R. R. vs State, 85 O. S. 251.

> The leases and grants owned by the plaintiff are subject to a present day construction and interpretation in relation to the surrounding facts and circumstances in harmony with the present relationship of the parties. Ordinarily such writings are considered contracts. The state we may now say in its proprietary capacity has treated them as contracts in accepting rentals, making new leases, contracting with lessees and owners for improvements, permitting the plaintiff to expand its plant by extensive improvements, and permitting the Law lease to be renewed under its own terms. Believing as we do that they assume the dignity of contracts, little difficulty is found in the solution."

Appellee's contracts have all the elements of a contract in the ordinary acceptance of the term. Under the facts and circumstances of those contracts many of the decisions of this court are applicable in favor of appellee's contention that the Act here in question impairs the obligation of said contracts and that if said Act shall be permitted to be executed and enforced, it will deprive appellee of its property under said contracts without due process of law.

Fletcher vs. Peck, 6 Cranch 87, 136, 137; 3 L. Ed. 162.

In the case of Fletcher vs. Peck, the State of Georgia in its early history had become the owner of a large tract of land within her territorial limits. The title is traced in the statement of the case, 6 Cranch 95-114, from the Crown of Great Britain to that state.

On the 7th of January, 1795, the Legislature of Georgia passed an Act authorizing the sale of certain portions of the lands to individuals calling themselves

respectively the Georgia Company, the Georgia Mississippi Company, the Upper Mississippi Company and the Tennessee Company. Certain of the lands were sold to these parties and thereafter Peck purchased and became the owner succeeding the original grantee in the chain of title of certain of these lands. Peck then sold and deeded a portion of the land so acquired by him to Fletcher and the deed from Peck to Fletcher carried covenants of good title in Peck. Thereafter on February 13, 1796, the Legislature of Georgia (pages 89, 90) passed another Act declaring the Act of January 7, 1795, to be null and void. The Act of February 13, 1796, in express terms declared that the Act of January 7, 1795, was an "usurped Act" passed under a pretended title, and in doing this the latter Act used the following language:

> "That the said usurped Act passed on the 7th of January, 1795, entitled, etc., be and the same is hereby declared null and void and the grant or grants, right or rights, claim or claims issued, deduced or derived therefrom or from any clause, letter or spirit of the same or any part of the same, is hereby also annulled, rendered void and of no effect; and as the same was made without constitutional authority and fraudulently obtained, it is hereby declared of no binding force or effect on this state or the people thereof but is and are to be considered both law and grant as they ought to be *ipso facto* of themselves void and the territory therein mentioned is also hereby declared to be the sole property of the state subject only to the right of treaty of the United States to enable the state to purchase under its preemption right the Indian title to the same."

Other sections of the later Act direct the enrolled earlier law, the grant and all deeds, contracts, etc., relative to purchases made under the earlier Act to be expunged from the records of the State.

It was claimed as facts in the case that the Act of January 7, 1795, authorizing the sale of these lands was passed because of promises and assurances made by three individuals to the members or certain members of the Legislature of Georgia that if such members would assent to and vote for the passing of the Act permitting such sales and if the Bill should become a law, such members should have a share of and be interested in all the lands which the three individuals making the promises and their associates should purchase of the state under authority of the Act; and it was claimed that these promises influenced members of the Legislature and that under such influence they voted for the passing of the Bill into a law. By reason of these facts it was claimed in the case that the Act of January 7, 1795, was a nullity, absolutely void and of no effect whatever.

After the nullifying Act of February 13, 1796, was passed, Fletcher instituted an action in the Circuit Court for the District of Massachusetts, an action upon the covenants of Peck in his deed to Fletcher, claiming in substance that the Act of February 13, 1796, had nullified his title to the property conveyed to him by Peck. Peck acquired his title to the lands not direct from the State of Georgia but from a prior grantee of the state and as the court said (page 132), he therefore was an innocent purchaser without knowledge of any claimed fraud in the Legislature of the State in passing the Act of January 7, 1795.

In the instant case appellee acquired all of its contracts, except one, from prior grantees of the state, but this was done with the consent of the state through resolution by the board of public works expressly permitting the assignments. The supplementary lease and agreement, Stipulation Exhibit No. 2, was granted direct to appellee by the state through the board of public works under authority of the Acts of 1830, 1840 and Section 4 of the Act of 1902.

Mr. Chief Justice Marshall wrote the opinion of the court in *Fletcher vs. Peck*, and in discussing the limitations of the Federal Constitution on the power of the Legislature of Georgia, he used language (page 136) wholly appropriate for adoption in the instant case, as follows:

> "The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The Constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.
>
> Does the case now under consideration come within this prohibitory section of the constitution?
>
> In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

The facts and rulings of this leading case are well known to the court and we will not extend the brief by reciting them further here, but we cannot refrain from calling to the special attention of the court its language in the opinion so pertinent to the instant case, as follows:

> "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do a particular thing; such was the law under which the conveyance was made by the government. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding upon the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. If, under a fair construction of the constitution, grants are comprehended under the term 'contracts,' is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and

that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves, and their property, from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state."

Dartmouth College case, 4 Wheaton 518, 641, 644, 654; 4 L. Ed. 629.

In this case this court held as follows:

"The charter granted by the British crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, is a contract within the meaning of that clause of the Constitution of the United States, Article I, S. 10, which declares that no state shall make any law impairing the obligation of contracts. The charter was not dissolved by the Revolution.

An Act of the state legislature of New Hampshire altering the charter, without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter, and is unconstitutional and void."

The Act in question here attempting to declare appellee's contracts with the state null and void, is a clear violation of Section 1 of the Fourteenth Amendment to the Constitution.

Los Angeles vs. Los Angeles Gas and Electric Corporation, 251 U. S. 32, 35, 38, 39, 40; 64 L. Ed. 121, 127.

The Act certainly contains none of the elements or principles of due process of law. Without any regard

for appellee's property rights, its great investment under said contracts, its large contribution to the improvement of the state's property, its faithful adherence to and compliance with every term, provision and condition provided in said contracts for it to comply with, and without making any provision whatever for compensation to appellee or reimbursement for its great loss that would be occasioned by the execution of the Act, the General Assembly of Ohio arbitrarily, without giving appellee any right to be heard in any form in any forum, attempts to declare appellee's contracts null, void and of no effect. So far as this Act is concerned, it offers to appellee no remedy whatever.

In this court under the bill of rights of the Constitution of the United States it cannot avail appellants any comfort as to what the earlier cases on which they rely decided. The facts are that the state entered into one of these contracts direct with appellee and consented to its purchase of the others; and the Act now in question attempting to abrogate, violate and annul such contracts certainly does violate and impair the state's obligations thereunder and does attempt to deprive appellee of its property without due process of law.

Louisville Gas Co. vs. Citizens' Gas Light Co., 115 U. S. 683, 688, 696, 698; 29 L. Ed. 512;

New Orleans Gas L. Co. vs Louisiana L. and Heat Co., 115 U. S. 650, 672; 29 L. Ed. 516, 524;

C. B. & Q. R. R. Co. vs Chicago, 166 U. S. 226, 234, 235, 237, 238, 239; 41 L. Ed. 979, 983;

New Orleans Water Works Co. vs. Rivers, 115 U. S. 674, 679, 680, 681; 29 L. Ed. 525.

The protective provisions of the United States Constitution invoked here apply to all agencies of the state whether legislative, executive or administrative.

C., B. & Q. R. R. Co. vs. Chicago, 233, 234, *supra;*

Raymond vs. Chicago Union Traction Co., 207 U. S. 20, 35, 36; 52 L. Ed. 78;

Home Telephone and Telegraph Co. vs. Los Angeles, 227 U. S. 278, 290, 291; 57 L. Ed. 510.

In deciding the case of *Russell vs. Sebastian*, 233 U. S. 204, Mr. Justice Hughes, delivering the opinion of the court on page 204, said, under the facts of that case:

> "That the grant resulting from an acceptance of the state's offer constituted a contract and vested in the accepting individual or corporation a property right protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court."

The justice then cites among others the following cases:

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 9; 43 L. Ed. 341, 345;

Louisville vs. Cumberland T. & T. Co., 224 U. S. 649, 663, 664; 56 L. Ed. 934, 940, 941;

Grand Trunk Western R. Co. vs. So. Bend, 227 U. S. 544, 545, 552, 556; 57 L. Ed. 633, 639; 44 L. R. A. (N.S.) 405;

Owensboro vs. Cumberland T. & T. Co., 230 U. S. 58, 64, 65; 57 L. Ed. 1389, 1393;
Boise Artesian H. & C. Water Co. vs. Boise City, 230 U. S. 84, 90, 91; 57 L. Ed. 1400, 1406.

In the case of *William F. Hayes vs. Port of Seattle,* 251 U. S. 233, 237; 64 L. Ed. 243, Hayes filed a bill in equity for an injunction to restrain the enforcement of an Act of the legislature of the State of Washington approved March 11, 1913, on the ground that the Act impaired the obligation of (a) an existing contract between him and the state in violation of Section 10 of Article I of the Constitution of the United States, and (b) that it deprived him of property without due process of law contrary to Section 1 of the Fourteenth Amendment. Under an Act passed in 1893 provision was made for the excavation by private contract of waterways for the uses of navigation, and under that Act the plaintiff obtained a contract with the state through the commissioner of public lands. The contract provided for the excavation by the plaintiff of a waterway in Seattle harbor extending from the outer harbor line to the head of Smith's Cove. Plaintiff was to be paid the cost of the work plus 15% and interest, for which he was to have a lien upon the tide and shore lands filled in by the material taken out in excavating the waterway. The state agreed to hold these lands subject to the operation of the contract pending its execution subject to the ultimate lien of the contractor thereon and that it would perform all things required by the Act of 1893 to be performed by the state. There was dispute over the specifications and the work

did not go on. Thereafter the Act of 1913 was passed providing that the waterway should be vacated and title to the land vested in the Port of Seattle. Plaintiff was advised of this legislative measure prior to its enactment. After its enactment the port commission of Seattle took possession of the waterway, exercised control over it and did a great amount of excavation, filling and bulkhead construction. The plaintiff then began his suit, and deciding the case this court said:

> "Upon the first constitutional point, it is important to note the distinction between a statute that has the effect of violating or repudiating a contract previously made by the state and one that impairs its obligations. Had the legislature of Washington pending performance, or after complete performance by complainant, passed an Act to alter materially the scope of his contract, to diminish his compensation or to defeat his lien upon the filled lands, there would no doubt have been an attempted impairment of the obligation."

Then the court says that:

> "The legislation in question had no such purpose or effect. It simply after seventeen years of delay without substantial performance of a contract, provided that the project should be abandoned and title to the public lands turned over to the municipality. Supposing the contract had not been abandoned by complainant himself or terminated by his long delay, its obligation remained as before and formed the measure of his right to recover from the state for the damages sustained."

The court then holds that the Act neither impaired the obligation of plaintiff's contract nor deprived him of his property without due process of law because there

was adequate provision for compensation in the statutes of the State of Washington which entitled any person having a claim against the state to begin an action thereon in the manner prescribed by the statute, after which the action would proceed in all respects as other actions with the right of appeal to the Supreme Court, and in case of a final judgment against the state a transcript of it would be furnished to the auditor of state, who then would be required to audit the amount of damages and costs therein awarded and pay the same out of the state treasury.

Appellee has no such remedy under the laws of Ohio because there is no statute of Ohio authorizing a citizen to sue the state in any such a case as this, and the law of Ohio is that a citizen may not sue the state without its consent.

Rodebaugh vs. State of Ohio, 96 O. S. 513.

In that case the syllabus reads as follows:

> "1. The state is not subject to suit in its own courts without its express consent.
>
> 2. The provision of the Ohio Constitution, Article I, Section 16, as amended September 3, 1912, that 'suits may be brought against the state in such courts and in such manner as may be provided by law' is not self-executing; and statutory authority is required as a prerequisite to the bringing of suits against the state."

Appellee's only remedy is the remedy it now seeks through this action against the state highway director.

j. *Injunction Is the Remedy*: We deem it unnecessary to comment on any of the many authorities sustaining the right of a complainant to the remedy of

injunction against administrative officers of a state enjoining the enforcement, operation or execution of a statute of the state upon the ground of the unconstitutionality of such statute. The remedy by injunction is given not only when the contract is entered into directly by the legislature of the state but also when it is entered into by the state through a public board authorized to make the contract and also when the state's power is exercised indirectly through the agency of a municipal corporation invested by the legislature with necessary authority for such purpose.

Terrace vs. Thompson, 263 U. S. 197, 214, 215, 216; 68 L. Ed. 255;

Cavanaugh vs. Looney, Attorney General, 248 U. S. 453, 456; 63 L. Ed. 354;

Louisville & Interurban R. R. Co. vs. Greening, Auditor, 244 U. S. 499, 506, 507; 61 L. Ed. 1280;

Cuyahoga River Power Co. vs. Akron, 240 U. S. 462, 463, 464; 60 L. Ed. 743;

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 9, 12, 13; 43 L. Ed. 341, 346;

Mobile Gas Co. vs. Patterson, 290 Fed. 476, 483.

k. *Appellee's Contracts Were Ratified and Confirmed by Subsequent Legislative Acts*: A grant by a state, defective when made because of lack of power or authority, may be cured through subsequent ratification and confirmation by the law making body of the state. We have already discussed the Act of 1902 claiming, and we believe demonstrating, that that Act ratified and con-

firmed appellee's contracts for the time they have yet to run according to their terms and this on the ground that Section 4 of that Act authorized and commanded the board of public works to revise and readjust all water contracts on the property here in question, including, of course, the contracts of appellee.

Our claim specifically on this phase of the case is that the Acts of 1830 and 1840 gave full power to the board of public works to make these contracts at the time they were made, navigation on the canal having been abandoned prior to the execution and delivery of the contracts. If, however, there was any lack of power in the board of public works to make such agreements as valid contracts binding on the state, then the Act of 1902 confirmed those agreements and validated them for the time they have yet to run.

But the State of Ohio through its law making body has ratified and confirmed these contracts in appellee in two separate legislative Acts passed since the execution and delivery of the contracts.

The first Act is the one passed January 22, 1920 (Appendix, Paragraph 35, page 225), under which Toledo purchased Lineal Part 1. This is the Act which was construed by the United States Circuit Court of Appeals for the Sixth Circuit in the case of *The Maumee Valley Electric Company vs. Toledo*, 13 Fed. 2d Series 98-105. In that case the court in effect held that the Act was a ratification and confirmation in appellee of the contracts, the Act providing that appellee could not be deprived of its rights under the contracts without compensation being first made therefor in accordance with the terms of the Act.

The second Act was the one passed March 27, 1925 (Appendix, Paragraph 37, page 230), which declared an abandonment of Lineal Part 2 of the canal and provided for the sale of the same to the county commissioners of Lucas County, Ohio. In its terms this Act is the same with respect to Lineal Part 2 as affected by appellee's contracts as was the Act of January 22, 1920, with respect to Lineal Part 1 and said contracts. This Act gave the county commissioners of Lucas County an option to buy Lineal Part 2, but provided that if they should see fit to buy it they should pay an appraisal price to be fixed by the agents of the state plus a fair compensation to the lessees of the state, including appellee, and their rights under their existing contracts for either land or water or both and their rights to a renewal of such contracts. These provisions of recognition, ratification and confirmation are written in Sections 1, 5, 6 and 8, and in Section 5 of that Act appellee's contracts were protected with respect to both Lineal Parts 1 and 2 of the canal.

Our claim for ratification and confirmation of these contracts by its legislative Acts is fully sustained by the case of *Terrett et al. vs. Taylor et al.*, 9 Cranch 43, 47, 50, 52; 3 L. Ed. 650.

In that case certain land grants in Virginia were made by the crown to the parson of a church for the use and benefit of the members thereof. An Act of the legislature of Virginia in 1776, passed after the original grant confirmed to the church its rights to these lands, but other Acts passed in 1798 and 1801 attempted to divest the church of the property acquired previous to the Revolution by donations as aforesaid. This court

held the legislative Act of 1776 to be a confirmation of the original grant and that if there were any defects in the original donations of the lands, such defects were corrected and the title confirmed in the church by that Act. It was also held that the Acts of 1798 and 1801 were unconstitutional and inoperative as violating the contract clause of the Constitution of the United States.

But in addition to all the above the Act attacked in this case cannot be sustained, but must be held to be contrary to the Constitution of the United States as impairing the obligation of appellee's contracts and depriving it of its property without due process of law on the principles of equitable estoppel.

Proceeding under the broad powers granted by the Acts of 1830 and 1840 and the Act of 1902, appellee acquired its contracts from the state through the latter's board of public works. Thereunder there was worked out between the board and appellee a definite plan through which the entire cost and expense of maintenance of the canal, including the Grand Rapids Dam, from the Maumee River to Lock 45 involving all of Lineal Part 2 and the southwesterly end of Lineal Part 1 to that lock, was laid upon and assumed by appellee. In working out that plan appellee, with full knowledge of the state, invested a large amount of money in constructing the hydro-electric plant at Maumee through which it could utilize the water called for by the contracts in generating electricity to be supplied to the public for light, heat and power purposes.

In the supplementary agreement executed and delivered in pursuance of the Acts of 1830 and 1840 and the later Act of 1902, the state recognized that its prop-

erty was not in condition to give satisfactory service to appellee and that the rentals received by it up to that time were not sufficiently large to enable it to give satisfactory service. The whole situation was therefore readjusted and revised and the rentals to be paid by appellee were greatly increased. Appellee reassumed the entire cost and expense of maintenance of all the property in question throughout the running of the contracts. In addition to all the above it assumed and performed the obligation to make, at its own expense, a great improvement on this property by deepening and widening the canal, removing all rock bars and other obstructions therefrom and raising the banks thereof so that the state could let into this canal as it agreed to do all the water that the canal could safely carry from the pool above the dam to the hydro-electric plant. This work of improvement cost appellee $53,000.00.

These facts bring this case, not only within the case of *Railroad vs. Cleveland*, 85 O. S. 251, but bring it fully within the case decided by this court of *Los Angeles vs. Los Angeles City Water Works Co.*, 177 U. S. 558, 582, 583, 584; 44 L. Ed. 886.

1. ***The Contract Between Toledo and the State Was Entered Into by the Latter in Its Private Capacity for the Benefit of Appellee, and the Act Attacked in This Case Impairs Its Obligations and Deprives Appellee of Its Property Thereunder Without Due Process of Law.***

The contract referred to in the above heading was entered into between the State of Ohio and the City of Toledo for the use and benefit of appellee under the provisions of the Act of January 22, 1920. This Act is set

out in full in Paragraph 35 of the Appendix to this brief, page 225. It was construed by the United States Circuit Court of Appeals for the Sixth Circuit in the case of *The Maumee Valley Electric Company vs. City of Toledo*, 13 Fed. 98-105. Under that Act Toledo purchased Lineal Part 1 of the canal in question here. The court of Appeals in the above decided case held that under the terms of that Act and the purchase by Toledo in pursuance thereof the State of Ohio entered into a contract with Toledo in behalf and for the benefit of appellee. The Act declared an abandonment of Lineal Part 1 of the canal both for canal and hydraulic purposes,

> "subject, however, to the rights hereinafter in Sections 6 and 7 provided for."

Section 5 gave the City of Toledo an option of either leasing or purchasing Lineal Part 1.

Section 6 provides that if Toledo should signify its intention to purchase the property, the governor was authorized as soon as the purchase price had been paid into the state treasury

> "to execute a deed conveying said property in fee simple to the City of Toledo, Lucas County, Ohio, but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both and the rights of said owners to a renewal of said existing leases, which deed before delivery shall first be approved by the attorney general."

Section 7 provides that if Toledo should decide to lease the property, the superintendent of public works

> "is hereby authorized to execute and deliver to the said City of Toledo a lease conveying to said city all the right, title and interest of the State

of Ohio in and to said abandoned canal property either in perpetuity or for a term of years, excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both and the rights of said owners to a renewal of said existing leases."

This section then further provides that:

"In case the state's lessees are at any time under the terms of this Act deprived of their water privileges, the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which they are entitled, and in case the amount of compensation cannot mutually be agreed upon, the City of Toledo shall proceed under the provisions of the General Code to condemn the rights of such lessees for the use of said municipality."

By the terms of the Act the city was to pay an appraisal price to be fixed by a board of appraisers appointed by the governor, plus the fair compensation to the state's lessees as shown by the above quotations. Such a board was appointed and fixed the price at $300,000.00 which the city thereafter paid and received a deed for the property containing the reservations and exceptions required by the Act as shown above. Stipulation Exhibit No. 15 (R. 133.)

Toledo refused to pay appellees for its rights under its contracts and threatened to divert the water from the canal through the side-cut at Maumee. Thereupon the case cited above of *Maumee Valley Electric Company vs. Toledo* was instituted and resulted as above described. Toledo was in that case forever enjoined through final decree on mandate (Stipulation Exhibit No. 18 (R. 138) from interfering in any wise with the

flow of the water in Lineal Part 1 to the hydro-electric plant at Maumee until Toledo should pay compensation to appellee for its water rights under its contracts as construed by the Court of Appeals. Toledo has refused to pay said compensation to appellee in any wise and said final decree is still in full force and effect.

At this point it should be remembered that all the water called for by appellee's contracts must come from the pool in the Maumee River above the Grand Rapids State Dam at the Village of Providence, Stipulation Exhibit No. 25, Map of the Canal, taken through all of Lineal Part 2 of the canal and the southwesterly 1.6 miles of Lineal Part 1 to the hydro-electric plant. Refusing to pay appellee any compensation for its water rights, Toledo procured the introduction and urged the passage by the General Assembly of Ohio of the Act attacked in this case. Section 18, Stipulation and Agreement Between the Parties on the Evidence (R. 66).

This Act declares an abandonment of Lineal Part 2 and attempts to declare appellee's and all other contracts calling for water to be drawn through this canal to be null and void, and it directs the state highway director to take the water out of Lineal Part 2 and to prevent any water from entering the same from the pool of the Maumee River above the State Dam.

The command to the highway director was that he take that action within sixty days after the effective date of the Act, which was August 10, 1927.

If the highway director were permitted to drain the water from Lineal Part 1 and prevent any water entering it from the Maumee River at Providence above the dam, all water called for by appellee's contracts would

be taken away from it just as effectively as if the water were diverted from the canal at the southwesterly end of Lineal Part 1, which is the property purchased by Toledo.

Prior to the passage of the Act attacked in this case, appellee, by the legislative Act under which Lineal Part 1 was sold to Toledo, was given complete remedy for the loss of its rights under its contracts and those rights were thereunder protected by injunctive decree of the United States Circuit Court of Appeals. Toledo in that case petitioned for a writ of *certiorari* to this court to review the same, but the petition was denied. (Case 554, October Term, 1926, United States Supreme Court.)

The Act attacked in this case (Appendix, Paragraph 39, page 236) would not only nullify the contract hereinabove described, entered into between Ohio and Toledo for the benefit of appellee, but it would nullify the decision of the United States Circuit Court of Appeals establishing that contract as well as the final decree entered in coformity with that decision.

Our claim is that this contract is within the protective provisions of the contract and due process clauses of the Constitution of the United States.

In the case of *State of Ohio ex rel. Archibald Houston et al. vs. Commissioners of Perry County*, 5 O. S. 497, 505, the facts briefly stated were that the county seat of Perry County was situated prior to 1851 in the Village of Somerset in that county. On March 22, 1851, the General Assembly of Ohio passed an Act referring to the voters of Perry County the question of the removal of the seat of justice of said county to New Lexington in

that county. The Act provided the method of proceedings for taking the vote by the people and provided that if more votes should be given at the election for removal than should be given against removal, then the seat of justice

> "shall be established at the Town of New Lexington, provided that said removal shall not take place until suitable county buildings shall have been provided in the Town of New Lexington."

It further provided that if the vote should be in favor of removal, it should be the duty of the county commissioners to erect in the Town of New Lexington a suitable court house, jail and other public buildings for the public offices of the county, and the commissioners were to dispose of the county buildings in Somerset as they might think proper and apply the proceeds thereof in the erection of the buildings at New Lexington.

It further provided that when suitable buildings should be provided, the officers and the Courts of Common Pleas and Supreme Court sessions should be held in New Lexington, and thenceforth that town should be the seat of justice in Perry County.

Section 6, however, provided that this Act should not take effect unless the friends of removal on or before July 1, 1851, secure to be paid to the commissioners of Perry County a sufficient amount of money to be paid in three equal installments to erect such suitable buildings in New Lexington, the commissioners to determine the amount necessary. Should the money be secured, as provided in this section, then notice was to be given by the commissioners to the voters by newspaper publication in the county for four weeks previous to the taking

of the vote that the amount necessary had been secured, and the Act provided that in that event the Act should be and remain in full force.

Before July 1, 1851, the friends of the removal of the county seat, consisting of the relators in the case and some fifteen others, secured to be paid to the then commissioners of the county the amount of money deemed necessary for the erection of the buildings at New Lexington. Publication of the election was made and a vote was taken in pursuance of the Act on the question of the removal. The election resulted by some hundreds majority in favor of removal.

The commissioners then in office March 2, 1852, entered into a contract for the erection of the buildings at New Lexington to be completed April 1, 1854. The work proceeded under the contract under direction of the then commissioners of the county, until November, 1853, when the buildings were nearly completed. At this time the then acting commissioners abandoned the buildings and refused to go further in their construction. They refused to permit anything further to be done on the buildings although they were almost completed and paid for out of funds raised by the relators and other friends of the removal in pursuance of the contract with the commissioners for raising the funds. On March 2, 1853, the General Assembly of Ohio passed an Act providing for the removal of the county seat of Perry County from New Lexington back to the Village of Somerset. The statute of March 22, 1851, and the vote taken thereunder, it will be remembered, had legally located the county seat at New Lexington, but actual removal had not yet been made when this Act of 1853 was passed. The re-

lators in the case were taxpayers of Perry County, residents of New Lexington and owners of property in and near that town. The Act of March 2, 1853, provided that after the taking effect of the Act, as in the Act provided, the seat of justice in the County of Perry should be removed from New Lexington and permanently fixed at the Town of Somerset. The Act further provided that it should take effect when and as soon as it should be adopted by a majority of the electors of Perry County voting at the next general election, as in the Act provided, and the Act provided how the vote should be taken.

Section 5 of this Act provided that if a majority of said electors of the county voting at the election should vote against removal back to Somerset, then all the obligations given by the relators and other taxpayers to the commissioners of the county, in accordance with the sixth section of the Act, passed March 2, 1851, should be delivered up to be cancelled, and the commissioners should proceed at once to levy a tax sufficient to erect a court house and other buildings in the Town of New Lexington which should cost not less than sixteen thousand dollars ($16,000.00).

On the vote taken under this Act a majority of the electors in Perry County voting on the question voted in favor of the Act for removal back to Somerset.

In deciding this case our Supreme Court in its opinion on page 505 of the report, used the following language:

> "In this posture of affairs, would it have been within the constitutional power of the legislature, without the consent if the parties, to annul this contract, and by enactment declare that the obli-

gations thus held by the commissioners should be delivered up and cancelled? We do not see how such a law could be reconciled with the provisions of our Constitutions, state and national, which were intended to secure the inviolability of contracts. But in the case before us, by the section under consideration, there is taken away from the people of Perry County all possibility of deriving any benefit from the contract which, through their commissioners, they had entered into with the relators; for, if they vote 'for removal' public buildings at New Lexington become unnecessary, and the relators are released from their obligation to furnish means for their construction.

If a vote 'against removal,' then, by the express terms of this section, 'all obligations heretofore given,' etc., 'shall be by said commissioners delivered up to be cancelled,' and the fund thus taken from the county, in violation of a subsisting, valid contract, is to be raised by immediate taxation; so that, in any event, the obligations of the contract are wholly cancelled."

The opinion holds that the contract between the friends of removal and the county commissioners was made for the benefit of all the taxpayers in Perry County and the fifth paragraph of the syllabus of the case is that:

"The fifth section of said Act imposes upon the County of Perry a forfeiture of subsisting rights acquired under a legal contract, in the event of a majority vote against removal of the seat of justice and is therefore unconstitutional."

In the case of *Terrett et al. vs. Taylor et al.*, 9th of Cranch, 43, 47, 48, 49, 50; 3 L. Ed. 650, certain land grants in Virginia were made by the crown to the parson of the church for the use and benefit of the members of

the church. An Act of Virginia of 1776 confirms to the church its rights to these lands, but other Acts passed in 1798 and 1801 attempted to divest the church of the property acquired previous to the Revolution by donations as aforesaid.

This court held that these Acts of 1798 and 1801 were unconstitutional and inoperative as violating the contract clause of the Constitution of the United States and as attempting to deprive the church of the property donated for the use and benefit of the members of the church. The court also held that if there were any defects in the original donations of the lands, the Act of the State of Virginia, passed in 1776, confirmed the title of the church in said lands and that it was not inconsistent with the constitution or bill of rights of Virginia.

Dartmouth College Case, 4 Wheat. 644, 645.

In the case of *The Maumee Valley Electric Company vs. City of Toledo*, 13 Fed. 2d Series 98-105, it was held that it has long been established that a person for whose use and benefit a contract has been made between other parties may enforce that contract in equity. This has been the rule in Ohio for many years.

Crumbach vs. Kugler, 3 O. S. 549;
Emmet vs. Brophy, 42 O. S. 82;
Embleton vs. McMechan, 110 O. S. 18, 30;
In re Roth, 272 Fed. 516;
Coster vs. Mayer, 43 N. Y. 411;
Keller vs. Ashford, 133 U. S. 610, 626; 33 L. Ed. 667;
Jones vs. Wilson, 180 U. S. 440, 447, 449; 45 L. Ed. 613.

We take it the real test as to whether a contract is protected by the contract clause of the Constitution prohibiting the impairment of the obligations of a contract is whether the contract may be enforced by the party for whose benefit it is made. If it is an illegal contract, then of course it is not a contract in a legal sense and may not be enforced. A lottery contract has been held by this court to be illegal and unenforceable.

Douglas vs. Kentucky, 168 U. S. 488, 502;
42 L. Ed. 553, 557.

Under the law as established by the Supreme Court of Ohio, appellee is in privity with the parties to this contract and to the contract itself. It was provided for by the Act of January 22, 1920, and it was executed and delivered through the deed from the state to Toledo. Stipulation Exhibit No. 15 (R. 133). The Act itself created privity between the parties to the contract and appellee, cast privity upon appellee.

Page on Contracts, 2d Ed., Vol. 4, Sec. 2388;
Washburn vs. Interstate Investment Co.,
26 Ore. 436, 441, 442, 443.
Brewer vs. Dyer, 7 Cush. (Mass.) 337, 340.

Privity is held to exist

"whenever the intention of the contract is to confer a benefit upon the third person."

Page on Contracts, *supra;*
Ruohs vs. Traders Fire Insurance Co., 111
Tenn. 405.
26 Ore. *Supra* 442.

There can be no question but that the General Assembly intended to protect and benefit appellee when the Act of 1920 was passed carrying the protective provisions thereof requiring Toledo, the other party to the contract, to compensate appellee for the loss of its water rights if the water should be taken out of the canal.

In the case of *The Maumee Valley Electric Co vs. Toledo*, 13 Fed. 2d Series 104, the court in discussing those protective provisions and the question as to whether the state was required under the law to protect appellee, said:

> "It is enough that as we think it chose rather to recognize its moral obligation to respect the rights of its lessees, property holders and citizens. That it had the legal and moral right to do so is undeniable. A contrary course would have been unnatural and inequitable. The city, by the acceptance of the deed from the state, upon the terms and conditions contained in the legislative Act, has effectively contracted to respect plaintiff's interests. This was part of the consideration for the purchase and sale. The city is, in our opinion, equitably estopped from repudiating the obligations towards plaintiff thus deliberately assumed."

The question of the right of a beneficiary under such a contract as this one to enforce the same usually arises between such beneficiary and the promisor, specifically in this case the City of Toledo. The state is the promisee. The great weight of authority is that the beneficiary may enforce such a contract against the promisor and that was the express holding in the case last quoted.

In the case of *Follansbee vs. Johnson*, 28 Minn. 311,

312, the Supreme Court of Minnesota in the opinon states that

> "The decided weight of authority in this country is to the effect that, with regard to contracts not by specialty, the person for whose benefit the promise is made may enforce it, though he be a stranger to the contract and to the consideration."

The above case is approved by the Supreme Court of Minnesota in the case of *Stariha et al. vs Greenwood*, 28 Minn. 521, 522.

The cases in which the rule will not be applied are cases in which the contract in question is not made for the benefit of the third party, generally cases in which neither of the contracting parties were bound in any way by any consideration to the third party.

Walsh vs. Railroad Co., 58 O. S. 123, 158, 159; 176 U. S. 469, 479.

In the *Walsh* case the United States Government in 1828 donated a large tract of land to the State of Ohio to aid that state in the construction of its canals. The Act of Congress making the donation provided among other things that

> "The said canals when completed *or used* shall be and forever remain public highways for the use of the Government of the United States free from any toll or charge whatever for any property of the United States or persons in their service passing along the same."

The state had sold a portion of the Hocking Canal to the Railroad Company, Walsh being a user of water from that portion of the canal. He brought an action against the Railroad Company and in support of his

claim urged that the legislative Act selling the canal to the Railroad Company impaired the obligation of the alleged contract between the United States and the State of Ohio under which the former donated the land to the latter. In answering this contention the Supreme Court of Ohio on page 159 of the report said:

> "But a more decisive answer to this contention is, we think, that none of these parties show that they were in any way parties to the agreement between the state and the United States, *or that it was made for their benefit.*"

The second paragraph of the syllabus, page 123, reads as follows:

> "2. A party cannot for his own benefit insist upon the performance of a contract between others and to which he is not a party or privy; nor claim relief against either of the parties to such a contract for investments or improvements he may have made on the assumption that the contract would be observed."

The same doctrine is settled and held to be the rule by this court.

> Keller vs. Ashford, 133 U. S. 610, 623, 624-626; 33 L. Ed. 667.

In the opinion of the *Keller* case, page 623, this court, discussing the question of the right of the third person, beneficiary, to enforce a contract made between two other parties for such third person's benefit, says:

> "In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is en-

> titled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt."

In the case of *Fry vs. Ausman*, 29 S. D. 30, 39, the Supreme Court of South Dakota in discussing this question quotes with approval the holding of this court in the *Keller* case, *supra*, and says in effect that for the third person to recover and enforce the contract, two elements must appear:

> "(1) There must be an intent to benefit the third party; and (2) the promisee must owe some obligation to the third party."

But in the instant case the moral or equitable obligation of the State of Ohio to protect appellee's contracts and provide for compensation to be paid to it, it sufficient consideration to and obligation on the state for such protection and provision. The state, through the legislative Act of 1920, made appellee a privy between the parties and to the contract entered into between the state and the City of Toledo under which Toledo purchased Lineal Part 1 of the canal. This Act by its own terms cast privity upon appellee. It made the City of Toledo the principal debtor as a part of the consideration to move from it in the purchase of the property in question. The state received $300,000.00 in cash for the property and through the Act required Toledo to compensate the state's lessees, including appellee. The least that can be said of the state's obligation in this respect is that it is a surety in behalf of appellee that it will never be deprived of its rights under its contracts until it shall be paid for such rights.

Kelley vs. Ashford, *supra*, 623.

The state, however, may not pass a law impairing the obligation of a previous statute based upon a moral and equitable consideration and obligation.

United States vs. Realty Co., 163 U. S. 427, 436, 437 to 442, 444; 41 L. Ed. 215.

In this case the Congress of the United States on October 1, 1890, approved an Act known as the Tariff Act of 1890. Section 231 of this Act provided a bounty of two cents per pound should be paid to certain producers of sugar and that a bounty on one and three-fourths cents per pound should be paid to certain other producers of sugar. Provision was made in the Act for the procedure to be followed by the producer to entitle him to receive the bounty. In August of 1894, Congress passed another Act through a section of which the provisions of the former Act providing for the payment of such bounties were repealed, and it was provided that thereafter it should be unlawful to issue any license to produce sugar or to pay any bounty for the production of sugar of any kind under the Act of 1890. (Pp. 428, 429.)

By an Act passed by the Congress on March 2, 1895, it was provided that the secretary of the treasury should pay bounties to certain producers of sugar who complied with the provisions of the bounty laws as contained in the Act of 1890 and for this purpose the Congress appropriated $238,289.08. This Act also provided for the payment of bounties to certain other producers of sugar who complied with the provisions of the bounty law as contained in the Act of 1890 prior to July 1, 1894, and who would have been entitled to receive a license as provided in said Act. For the payment of these bounties

the Congress appropriated $5,000,000.00 or so much thereof as might be necessary. (P. 430.)

Under the provisions of the Appropriation Act last above mentioned two parties, the Realty Company and Andrew H. Gay, each presented a claim for an amount of bounty claimed to be due under the Act, which claims were refused by the disbursing officer of the government, and each of these parties then brought an action under the Tucker Act in the Circuit Court of the United States for the Eastern District of Louisiana to recover the amount claimed due them respectively. The government claimed that the Act of 1890 insofar as it provided for the payment of bounties was unconstitutional, null and void, and that therefore the Appropriation Act providing for payment of bounties was unconstitutional and void. (Pp. 431, 432.) This court held that it was not necessary to pass upon the constitutionality of the Act of 1890. The government claimed (p. 437) that:

> "No claim, legal, moral, equitable or honorable, can be created in favor of the sugar manufacturer and against the government, and that where there is neither legal, moral nor honorable obligation to pay, Congress has no power to appropriate money."

This court held that:

> "In our opinion it is not correct to say that no moral, equitable or honorable obligation can attach in favor of persons situated as were the defendants in error here, when the Act of 1895 was passed. We think obligations of that nature may arise out of such circumstances. We regard the question of the unconstitutionality of the bounty provisions of the Act of 1890 as entirely immaterial to the discussion here."

Then again on page 439 the opinion says:

> "We are of the opinion that the parties situated as were the plaintiffs in these actions acquired claims upon the government of an equitable, moral or honorary nature. Could Congress legally recognize and pay them although the Act of 1890 as to its bounty provisions might be unconstitutional? It is true that in general an unconstitutional Act of Congress is the same as if there were no Act. That is regarding it in its purely legal aspect. Being in violation of the Constitution, that instrument must govern and no one can base any legal claim as arising out of such an Act. That is a very different principle, however, from that which we think governs in this case."

Referring to the power of Congress under the Constitution "to pay the debts" of the United States, the holding is that:

> "The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a debt to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature such as are binding on the conscience or the honor of an individual although the debt could obtain no recognition in a court of law."

This court held the Appropriation Act to be a valid Act upon the considerations above set out and it finally says, page 443:

> "The power to provide for claims upon the state founded in equity and justice has also been recognized as existing in the state governments.

For example, in *Guilford vs. Chenango County Supers.*, 13 N. Y. 143, it was held by the New York Court of Appeals that the legislature was not confined in its appropriation of public moneys to sums to be raised by taxation in favor of individuals to cases in which legal demands existed against the state, but that it could recognize claims founded in equity and justice in the largest sense of these terms or in gratitude or in charity.

Of course the difference between the powers of the state legislatures and that of the Congress of the United States is not lost sight of, but it is believed that in relation to the power to recognize and to pay obligations resting only upon moral considerations or upon the general principles of right and justice, the Federal Congress stands upon a level with the state legislature."

Williamsburgh Savings Bank, Appellant,
vs. State of New York, Respondent,
243 N. Y. Rep. 231-234, 244, 245.

In the *Williamsburg Savings Bank* case the State of New York, through its legislature, entertained a project to improve a creek providing for a better flowage of its waters and protection to adjacent lands from floods and other damaging conditions. The state did not itself undertake this project, but confided the duties, first, of approval of the project and then the consummation of it, to the state's water supply commission and two other commissions. Provision was made in the Act that the cost and expense should be paid through special assessments levied upon the property and various municipalities to be benefited by the improvement. The commissions approved the plan, started the improvement and issued bonds to pay the cost and expense of

the improvement. It levied the assessments, however, only on certain lands. It finally turned out that the lands were not of sufficient value to bear the improvement assessments placed upon them and therefore funds were not forthcoming from the owners of this property to pay the bonds. The legislature had made these bonds legal investments for savings banks, and the improvement commissions had represented to the public that the lands assessed were of ample value to bear the assessment. The legislature thereafter passed an Act, page 239 of the report, conferring jurisdiction upon the Court of Claims to hear and determine the claims of the holders and purchasers of the certificates of indebtedness, bonds and tax sale certificates issued in connection with the creek improvement district. The plaintiff in error brought suit to establish its claim on some of the bonds against the state and alleged that the claim was supported by a moral consideration. The state objected on the grounds, first, that there was no such consideration, and second, the state had never exercised its right to recognize the claim and authorize its allowance. The appellate court of New York in the opinion deciding the case and holding that under the circumstances of that case the state was morally bound to pay the bonds and that the legislature had authorized payment of the claim on a moral consideration, cited with approval the case of *United States vs. Realty Company, supra.* (Pages 244, 245.)

The opinion at page 245 takes up the question whether the facts in that case did establish a claim possessing the elements of a moral obligation, and after re-

citing the facts on pages 245 and 246 more in detail than we have given them above, said:

> "Those facts, in our opinion, within the principles of cases already cited, do not permit it to be said as a matter of law that the state is without any moral responsibility for what has happened and that it must stand unresponsive when asked to relieve those whom indirectly at least it has brought into an unhappy predicament by retiring obligations which in essence and equity are its own. We find it quite difficult to believe that an honorable business man would not suffer considerable moral discomfort if he should refuse to recognize claims to reparation for losses for which he was so substantially responsible as is the state for the present claims and, in such matters, standards of good conduct ought not to be less conscientious in the case of the commonwealth than in that of one of its citizens."
>
> Keith vs. Clark, Collector, etc., 97 U. S. 454, 463; 24 L. Ed. 1071, 1074.

In this case the State of Tennessee in 1838 organized the Bank of Tennessee and in the 12th section of the Act of the legislature it was

> "enacted that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this state and by all tax collectors and other public officers in all payments for taxes or other moneys due to the state."

Plaintiff Keith tendered to Clark the tax collector, $40.00 of the bills of the Bank of Tennessee. Clark refused to accept the bills and Keith paid $40.00 in lawful money under protest for taxes due the State of Tennes-

see after he had tendered that sum in the circulating notes of the Bank of Tennessee. These bills were issued subsequently to May 6, 1861, and the collector refused to take them, as above stated, because the Constitution of the State of Tennessee was amended in 1865 (prior to Keith's attempt to use the bills in payment of taxes), such amendment declaring that all the notes of the bank issued after May 6, 1861, were null and void, and forbade any legislature to pass laws for their redemption. Keith instituted action to recover the $40.00, but was defeated in the lower courts and the Supreme Court of Tennessee sustained their holdings. Error was prosecuted by Keith to this court. This court held that the contract between the State of Tennessee and its own bank providing that all that bank's bills should be received in payment of taxes, was a contract protected by the contract clause of the Constitution. (Page 462.) That contract of course was made for the benefit, among others, of all taxpayers who should happen to come into possession of the circulating notes of the bank. In other words, the contract there in question was a contract between the State of Tennessee and the Bank of Tennessee for the benefit and in behalf of all taxpayers of the state.

This court held that the State of Tennessee must carry out the contract.

Now, what we are contending for is that through the Act of January 22, 1920, in pursuance of which Toledo entered into a contract with the State of Ohio for the benefit of appellee, which contract was consummated by the deed from Ohio to Toledo (R. 133) appellee had and except for the Act attacked in this case still has a complete remedy for compensation to it for the loss of its

rights under its contracts if the water shall be taken out of the canal. (R., Final Decree on Mandate, p. 138.) If the Act attacked in this case shall be executed and the water be drained from Lineal Part 2 of the canal and be prevented from entering that part from the Maumee River, then appellee's remedy is gone and its property, both under its contracts and in its plant, is confiscated.

In the case of *United States ex rel. Von Hoffman vs. City of Quincy*, 4 Wall. 535, 550, 552, 553; 18 L. Ed. 409, this court said:

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed in the sense of the law, be said not to exist and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of the contract is the law which binds the parties to perform their agreement. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden."

> "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired a tall. This is not a question of degree or cause but of encroaching in any respect on its obligation—dispensing with any part of its force."

> White vs. Hart, 13 Wall. 646, 654; 20 L. Ed. 685.

> Hendrickson vs. Apperson, 245 U. S. 105, 112.

The contract clause of the Constitution does not by its terms exclude a contract made between two parties for the benefit of a third. The clause is all-inclusive.

Fletcher vs. Peck, 6 Cranch 87, 136, 137.

In the instant case the law is established that the contract here was made for the benefit of appellee, and our United States Circuit Court of Appeals has said that the promisee, the state, was under moral and equitable obligation to extend that protection. This statement of that court is sound, not only because of appellee's contracts with the state even if such contracts had been entered into by the state in its governmental capacity, but they were entered into by the state in its proprietary or private capacity, and because of that fact the State of Ohio was legally bound to protect appellee in its contracts.

It certainly cannot be the law that a sovereign state may enter into such agreements as appellee's contracts are, under the attendant circumstances, bind its grantee to the performance of specified obligations to the state's lessee as a part of the consideration of the grant from the state to its grantee, and then through a subsequent legislative Act annul the contract with that grantee so far as the beneficiary is concerned by taking away from such beneficiary all remedy under its contracts direct with the state and under the contract between the state and its grantee, made for benefit of appellee.

4. The Act in Question Here Passed May 11, 1927, (Appendix, Paragraph 39, page 236) Shows on Its Face That There Is No Intention on the Part of the State Itself Ever to Devote These Canal Lands, Lineal Part 2, to Highway Purposes, But That on the Contrary It Is an Act Designed Particularly to Turn This Property, Which Belongs to All the Citizens of Ohio, Over to the Political Subdivisions of Lucas County and the Townships and Municipalities Along the Line of Such Lands Without Any Consideration Moving From Such Subdivisions.

On this subject it will first be noted that after providing in Section 1 for the abandonment of the canal, Section 3 provides that the lands used and occupied by that part of the canal shall be forever held by the state in fee simple for the purpose of constructing thereon a highway at such times as the state *may hereafter* find convenient. The Act, so far from evidencing any present intention or need of the state to devote the canal bed to that purpose, distinctly belies any such need. This is followed by Section 4, containing, if appellants' contention is sound, the wholly unnecessary provision that all leases for canal or hydraulic purposes shall become null and void *on and after sixty days* from the taking effect of the Act. Up to this point, therefore, the Act attempts a wholly uncalled for, unnecessary thing, to-wit, the destruction of the water power and the cancellation of water leases prior to any need on the part of the state of the land for alleged highway purposes. Then follows the real motive behind the abandonment. By Section 7 the director of highways is to plat so much of

the canal as is to be used for highway purposes and so much of it as may be leased for other purposes. *But until the state shall construct the highway,* all municipal corporations through which the proposed highway may (perhaps) pass *are permitted to use* the canal lands *without compensation.* (Section 8.) Here is a water power granted to the appellee under which it has expended large amounts of money improving the state's property and constructing appellee's own plant, relying on the supposed good faith of the state. For the pretended reason that it is necessary for state highway purposes the legislature proposes to abandon the canal, and then, as an admission that it is not at all necessary for those purposes, the abandonment Act provides that until the state constructs the highway the municipalities *may use the land gratis.* The Act shows that the proposal of the state to use the canal bed for highway purposes is really not contemplated and entirely apart from the question whether the state may abrogate its water power grants in order to permit a canal bed to be used by municipalities *free of charge,* it is respectfully submitted that here in this court of equity the abandonment Act should be scrutinized from the standpoint of its lack of good faith, particularly in view of the fact that in 1925 (111 Ohio Laws, 367) the legislature's then attempted abandonment of the canal provided compensation to the appellee and a reasonable price to be paid by the county to the state for the canal land. To have to pay for the land and for plaintiff's water power, however, was not to the liking of the county, as it is not to the city, and so we are now confronted with the spectacle of an abandonment Act providing no compensation for

the appellee and permitting the county and adjacent municipalities to use the canal gratis.

To permit the Act attacked here to be executed would amount simply to a turning of this property to the use, occupation and benefit of the City of Toledo and the other municipalities and townships along the line. Such a course is forbidden by the contract clause and Section 1 of the Fourteenth Amendment to the Constitution.

Missouri Pacific Railway Co. vs. Neb., 164 U. S. 403; 41 L. Ed. 489.

Respectfully submitted,

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APPENDIX

Desiring in connection with this case to set out a complete legislative history of the Miami and Erie Canal, beginning with the Constitution of Ohio of 1802 and giving reference to, recitals of, and quotations from, the various legislative Acts, and the Constitution of 1851 and amendments thereto, we concluded that in addition to such history as is narrated in the body of the brief, we should attach to this brief an appendix with headings properly numbered and in paragraphs also numbered so that the same may be referred to in the argument on the points of law and fact discussed. The constitutional and legislative provisions are in evidence under stipulation between the parties. (R. 59.)

CONSTITUTION AND STATUTES OF OHIO TO BE CONSIDERED

I

Provisions of Ohio Constitution With Respect to the Public Works of Ohio of Which the Miami and Erie Canal Has Always Been a Part.

Paragraph 1. The first constitution of Ohio, 1802 contained no specific provision with respect to canals or other public works. By Section 1 of Article I of that constitution, the legislative power of the state was vested in a General Assembly consisting of a Senate and House of Representatives, and the power for constructing the public works of the state, including its canals, was of course lodged in the General Assembly by that provision of that constitution.

Under that constitution the entire public works of the state were provided for and constructed, and under it they were operated through laws passed by the General Assembly until the constitution of 1851 was adopted.

The only provisions in the constitution of 1851 with respect to public works were Sections 12 and 13 of Article VIII.

Section 12 provided that:

> "So long as this state shall have public works which require superintendence there shall be a board of public works to consist of three members who shall be elected by the people at the first general election after the adoption of this constitution, one for a term of one year, one for a term of two years and one for a term of three years; and one member of said board shall be elected annually thereafter who shall hold his office for three years."

Section 13 provided that:

> "The powers and duties of said board of public works and its several members and their compensation shall be such as now are or may be prescribed by law."

These provisions remained in the constitution of 1851 until September 3, 1912, when Section 12 was amended, providing that:

> "So long as this state shall have public works which require superintendence, a superintendent of public works shall be appointed by the governor for the term of one year, with the powers and duties now exercised by the board of public works, until otherwise provided by law and with such other powers as may be provided by law."

Section 13 above mentioned was repealed September 3, 1912.

II

Legislative Provisions, Primary Acts for Construction and Operation of Canals of Ohio.

Paragraph 2. The *first Act* passed by the General Assembly of Ohio looking to establishment of the state's canal system is the Act passed February 23, 1820, 18 O. L. 147, Vol. 2 Chase's Statutes, page 1131, entitled "An Act Respecting a Navigable Communication Between Lake Erie and the Ohio River." This Act in a preamble recites:

> "Whereas, the effecting a navigable communication, by means of a canal or canals, between Lake Erie and the Ohio River would greatly promote the agricultural, manufacturing and commercial interests of a number of our sister states, of the Union generally and of this state particularly. And whereas there is reason to believe that the congress of the United States, as well from the above motives as from the advantage to be derived from the great appreciation of public lands, through which such navigable communication might pass, would give liberal aid for effecting so desirable an object, therefore,"

Section 1 provided the General Assembly should appoint three commissioners for locating a route for a canal from Lake Erie to Ohio River on the understanding that it should be located through the congress land in the late purchase from Indians in the state.

Section 2 provided that the commissioners should employ a competent engineer and necessary assistants to make surveys for the route of such canal.

Section 3 provided that propositions should be immediately made to congress for a donation and grant of

land to be not less than two miles in width on such route as examination might find most eligible for a canal through part of lands of the United States lately purchased of Indians in Ohio and to be not less than one million (1,000,000) nor exceeding two million (2,000,000) acres in the same tract of country and contiguous to the route of such canal; that the route should be located within one year from date of the Act of congress authorizing the donation or grant and that the canal be completed so far as it should pass through such donation within ten (10) years from time location should be made.

Section 5 provided that the State of Ohio would accept such conditions in relation to recession of the land granted by the United States as the latter might think proper if the canal should not be commenced and carried on according to terms of the cession.

Section 6 provided for the payment of accounts for services of engineers and assistants.

Paragraph 3. The *second Act* of the General Assembly of Ohio was passed January 31, 1822, 20 O. L. 31, Volume 2 Chase's Statutes, page 1220, entitled, "An Act Authorizing an Examination Into the Practicability of Connecting Lake Erie with the Ohio River by a Canal." This Act in a preamble recites that:

> "Whereas, a navigable communication between Lake Erie and the Ohio River would greatly promote the agricultural, manufacturing and commercial interests of the good people of the State of Ohio, and would unite, by the cementing influence of interest and commercial intercourse, the most remote parts of the United States, thereby strengthening the bonds of their political union; and whereas, the practicability of making such navigable communication has not been satisfac-

torily ascertained by an experienced and skillful engineer; therefore, with a view to obtain accurate information touching this highly interesting subject."

This Act authorizes the governor to employ an engineer to make surveys between Lake Erie and the Ohio River; appoints Benjamin Tappan, Alfred Kelly, Thomas Worthington, Ethan A. Brown, Jeremiah Morrow, Isaac Minor and Ebenezer Buckingham Jr., commissioners, to cause examinations, surveys and estimates to be made by an engineer as may be necessary to ascertain the practicability of such canal through the following routes: (a) Sandusky Bay to the Ohio River; (b) Maumee River to the Ohio River; (c) from Lake Erie to the Ohio River by the sources of Cuyahoga, Black and Muskingum Rivers; (d) from the lake by sources of Grand and Mahoning Rivers to Ohio River; and directs these commissioners to make estimates of cost on each route, and compare the advantages of the different routes and report their findings to the next General Assembly with such other information as they might deem important.

Paragraph 4. The *third Act* of the General Assembly was passed January 27, 1823, 21 O. L. 24, Volume 2 Chase Statutes, page 1255, entitled:

> "An Act supplementary to the Act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal."

This Act authorized the canal commissioners constituted by this and the above recited Act to employ necessary engineers and assistants to carry on the surveys; authorized the commissioners to receive cessions, grants or donations of land or donations of any kind for aid in

construction of the canal; directed the commissioners to appoint two of their board as acting commissioners and fix their compensation; directed the commissioners to ascertain whether loans could be obtained on behalf of the state to aid in construction of a canal from Lake Erie to the Ohio River; and appropriated money to pay the engineers and assistants.

Paragraph 5. The *fourth Act* was passed by the General Assembly February 23, 1824, Volume 3, Chase's Statutes, page 1963, entitled:

> "An Act in addition to the Act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal."

This Act directs the canal commissioners to continue their labors carried on under the former Acts and also survey the Muskingum and Scioto route not yet completed; to examine the harbors on Lake Erie for terminals; directs the commissioners to employ an engineer of experience in canaling to superintend surveys and estimates heretofore directed and make report to the General Assembly. The Act appropriates money for these purposes.

Paragraph 6. The *fifth Act* was passed by the General Assembly February 4, 1825, 23 O. L. 50, Volume 2, Chase's Statutes, page 1472, entitled:

> "An Act to provide for the internal improvement of the State of Ohio by navigable canals."

This Act provides the canal commission created by the Acts above referred to should consist of seven members appointed by joint resolution of senate and house of representatives; provides their compensation and author-

izes employment of agents, engineers and surveyors; authorizes the commissioners to commence and prosecute making of a navigable canal on Muskingum and Scioto route to Lake Erie and also a navigable canal on so much of the Maumee and Miami line as lies between Cincinnati and Mad River at Dayton, Ohio; creates for such construction a canal fund and a board of commissioners denominated "Commissioners of the Canal Fund" of three members to continue in office for six years, and prescribes their powers and duties in borrowing and disbursing funds. This is the Act which actually authorized the construction of the Miami Canal heretofore mentioned as running from the Ohio River north to Dayton and the Mad River.

Section 5 of this Act provides for payment of interest and final redemption of moneys borrowed under the Act, and in this Section 5 the Act appropriates and pledges:

> "All the net proceeds of tolls collected on the canals herein described *and of the rents and profits of all works and privileges* connected with or appertaining to said canals and belonging to the state."

The above quotation from this primary Act definitely indicates the intention of the General Assembly to utilize the canals for other purposes than navigation. Such langauge undoubtedly would permit the leasing of lands or water or both for hydraulic purposes. This Section 5 makes provision for raising funds for each of several years after passage of the Act and appropriates the same for canal construction.

Section 6 of this Act provides that the money pledged and appropriated by the Act:

> "Together with the net proceeds of all tolls *and of the rents and profits of all works and privileges* connected with said canals shall be paid into the state treasury and shall be kept distinct and apart from other moneys belonging to the state."

This section further provides for keeping of accounts.

Section 7 of this Act authorizes the canal commissioners to receive funds from commissioners of the canal fund.

Section 8 of this Act reads as follows:

> "Sec. 8. That it shall and may be lawful for the said canal commissioners, and each of them by themselves, and by any and every superintendent, agent, and engineer, employed by them to enter upon, and take possession of, and use all and singular any lands, waters, streams, and materials, necessary for the prosecution of the improvements intended by this Act; and to make all such canals, feeders, dykes, locks, dams, and other works and devices as they may think proper for making said improvements, doing, nevertheless, no unnecessary damage, and that in case any lands, waters, streams, or materials, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this state, it shall be the duty of the canal commissioners, on application being made to them by the owner or owners of any such lands, waters, streams or materials, to appoint by writing not less than three nor more than five discreet disinterested persons as appraisers, who shall before they enter upon the duties their appointment, severally take an oath or affirmation, before some person authorized to administer oaths, faithfully and impartially to perform the trust and duties required of them by this Act, a certificate of which

oath or affirmation, shall be filed with the secretary of the canal commissioners, and it shall be the duty of said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss or damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises, so required for the purposes aforesaid, and the said appraisers, or a majority of them, shall make regular entries of their determination and appraisal, with an apt and sufficient description of the several premises, appropriated for the purposes aforesaid, in a book, or books, to be provided and kept by the canal commissioners, and certify and sign their names to such entries and appraisal, and in like manner certify their determination as to those several premises which will suffer no damages, or will be benefited more than injured by or in consequence of the works aforesaid, and the canal commissioners shall pay the damages so to be assessed and appraised, and the fee-simple of the premises so appropriated shall be vested in this state; *provided, however*, that all such applications to the board of canal commissioners, for compensation for any lands, waters, streams, or materials so appropriated, shall be made within one year after such lands, waters, streams, or materials, shall have been taken possession of, by the said commissioners, for the purposes aforesaid."

Section 9 exempts employes on the canal from military duty.

Section 10 authorizes the canal commissioners to make application for the state to congress and owners of lands for grants and donations of land or money to aid in construction of both or either of said canals.

Paragraph 7. The *sixth Act* was passed by the General Assembly January 18, 1826, Volume 3, Chase's Statutes, page 1516, and authorizes the commissioners of

the canal fund to borrow on the credit of the state up to Four Hundred Thousand Dollars ($400,000.00) in the year 1826; a sum not exceeding Six Hundred Thousand Dollars ($600,000.00) in 1827; a sum not exceeding Six Hundred Thousand Dollars ($600,000.00) in the year 1828, and all this in addition to the Six Hundred Thousaid Dollars ($600,000.00) authorized by the fifth Act described above.

Section 2 of this Act authorized a temporary loan of Five Hundred Thousand Dollars ($500,000.00) to be repaid from moneys obtained through the loans last above mentioned, and all these moneys were to be paid out according to the terms of the fifth Act above described.

Paragraph 8. The *seventh Act* was passed by the General Assembly January 31, 1826, Volume 3, Chase's Statutes, page 1525. This Act in twelve sections sets up the legal machinery for the protection of the Ohio canals with respect to the towing path and other banks, obstructing the canal, taking the water therefrom, etc., and prescribes criminal and other penalties for violations of the Act.

In its Section 7 it is specifically provided:

> "That no person shall construct any wharf, basin or watering place on or make or apply any device whatever for the purpose of taking water from either of said canals without first obtaining permission therefor of one of the acting commissioners or of the principal engineer of the canal where such wharf, basin, watering place or device, as aforesaid, is desired, in writing,"

and the section then provides that if any person shall make any such construction or apply such device without such permission or shall not conform to the directions of

the acting commissioner who may give such permission in respect to the location, size and place of such device, such person so offending shall be fined, etc.

Paragraph 9. The *eighth Act* was passed by the General Assembly February 7, 1826, Volume 3, Chase's Statutes, page 1527.

Section 1 of this Act provides:

> "That the canal commissioners be and they are hereby authorized to procure by purchase or otherwise a suitable number of acres of land at each and every point on or adjoining the Ohio canals heretofore authorized to be constructed where the surplus water passing through such canals may be profitably used for *hydraulic* purposes."

An expenditure of the sum of Twenty Thousand Dollars ($20,000.00) was authorized by this section for the purposes just stated.

Section 2 of this Act provides:

> "That the canal commissioners are hereby authorized and empowered to sell such lands and town lots as have heretofore been or may hereafter be given, granted or ceded to the state for the benefit of the canal fund, *other than those which are situated at points or places on or adjoining the line of the Ohio canals where the surplus water produced by said canals can be advantageously used for hydraulic purposes.*"

The canals actually authorized up to the date of this Act were the Miami Canal from the Ohio River to Dayton and the canal on the Muskingum and Scioto route in the eastern part of the state. (See fifth Act above described.)

Paragraph 10. The *ninth Act* was passed February 8, 1826, Volume 3, Chase's Statutes, page 1528. This Act authorizes the canal commissioners to borrow Six Hundred Thousand Dollars ($600,000.00) of any individual or body corporate instead of the loan of Five Hundred Thousand Dollars ($500,000.00) above mentioned.

Paragraph 11. The *tenth Act* passed by the General Assembly of Ohio was passed February 11, 1828, Volume 3, Chase's Statutes, page 1598. This Act makes further provision for protection of the Ohio canals and authorizes the canal commissioners to cut a navigable side-cut or branch canal from the main canal to enter the Muskingum River at or near Dresden, and also to construct or permit to be constructed a similar branch between the Miami Canal and the Town of Hamilton, Ohio.

Section 5 of this Act, for the first time apparently, gives express authority to sell water from the canals for hydraulic purposes, in the following words:

> "That whenever, in the opinion of the board of canal commissioners, any water may be spared from any state canal or works connected therewith without injury to the navigation or safety of such canal, the board may order a sale of such surplus water for a term of years in their discretion to the person who shall bid the highest annual rent therefor; provided, the same shall not in any wise interfere with the rights of individuals."

Paragraph 12. By an *Act of Congress* passed May 24, 1828, Volume 4, Statutes at Large, page 305, the United States donated large tracts of land to the State of Ohio and authorized Ohio to sell such lands and use

the funds in extending the Miami Canal from Dayton and the Mad River to Lake Erie. This Act required the canal to be completed within a certain time and attached certain other conditions to the aid given by Congress, but on April 2, 1830, 4 Statutes at Large, page 393, Congress extended indefinitely the time in which to complete the canal from Dayton to Lake Erie, and provided that if Ohio should devote lands donated or the money from the sale of such lands to any other purpose than construction of the canal before completion thereof, then Ohio must pay the United States for said lands at the same rate as should be received by Ohio for the same.

Paragraph 13. The *eleventh Act* of the General Assembly of Ohio was passed December 22, 1828, entitled "An Act declaring the assent of the State of Ohio to the provisions and conditions of an Act of Congress," meaning the Act of Congress mentioned next above.

Paragraph 14. The *twelfth Act* of the General Assembly was passed February 9, 1830, entitled "An Act to authorize canal commissioners to examine into the practicability of extending the Miami line of the canal from Mad River near Dayton to Defiance and the mouth of the Auglaize River." (Volume 3, Chase's Statutes, page 1644.)

This Act made it the duty of the canal commissioners to employ competent engineers and assistants, proceed to examine and ascertain the practicability of extending, and if found practicable, the expense of extending the Miami Canal from a point near Dayton to Defiance on the Miami of the Lake; and provided that the expense should be paid out of the sale of Congress

land granted the state to aid in constructing the canal from Dayton to Lake Erie.

Paragraph 15. The *thirteenth Act* was passed February 18, 1830, entitled "An act in addition to the several Acts for the protection of the Ohio canals and other purposes." (Volume 3, Chase's Statutes, page 1659.)

Section 1 of this Act provides that no person shall draw any water from the canals of the state for any purpose nor use any water power created by the construction of any dam or feeder nor use any water for any hydraulic purpose from the canals unless such person shall have purchased from the canal commissioners the right to use such water for hydraulic power.

Section 2 prescribes a penalty and manner of recovering the same for violating the above.

Sections 3 to 7, inclusive, being all the remaining sections of the Act, provide as follows:

> "Sec. 3. That whenever, in the opinion of the board of canal commissioners, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purposes of navigation, the said commissioners may order such surplus water, and any lands granted to, or purchased by the state, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes; subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity, or for a limited number of years, for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state.

Sec. 4. That the provisions of the foregoing section shall extend to and include the water passing around locks, from one level to another, on either of the canals of this state.

Sec. 5. That no hydraulic power, nor right to the use of any water, shall be sold, leased, or conveyed, except such as shall accrue from the surplus water of the canal, feeders or dams or from the water passing around any lock, after supplying the full quantity necessary for the purposes of navigation.

Sec. 6. That every lease, grant, or conveyance of water power shall contain a reservation and condition, that the state or its authorized agents may, at any time, resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders or streams, from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeable to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns.

Sec. 7. All moneys received for the rent or sale of any hydraulic power granted or conveyed under the provisions of this Act shall be paid into the state treasury, and constitute a part of the canal fund, and shall be subject to the same rules and regulations as are prescribed in the sixth section of the Act to provide for the internal improvement of the State of Ohio by navigable canals."

Paragraph 16. The *fourteenth Act* was passed by the General Assembly of Ohio, February 23, 1830, 28 O.

L. 61, entitled "An Act constituting proceeds of sales of canal lands a portion of the general canal fund."

By this Act the proceeds of sales of canal lands granted to Ohio by Congress, as shown above, were constituted and made a portion of the general canal fund.

Paragraph 17. The *fifteenth Act* of the General Assembly was passed March 3, 1831, Chase's Statutes, Volume 3, page 1862, entitled "An Act to provide for the purchase of water privileges."

This Act provides as follows:

> "That where any feeder to either of the canals of this state, from any stream which is not navigable and a public highway, has been constructed, or may hereafter be constructed, at the expense of the state, by which a greater quantity of water may be introduced than is required for the purposes of navigation, thereby creating valuable hydraulic privileges, either on said feeder or on the canal receiving water therefrom; and where the introduction of such additional quantity of water will injure mills or mill sites on such stream between the point where the water is to be taken out, and the point at which it is to be returned into such stream; the canal commissioners shall be authorized to purchase for, and on behalf of the state, any such mill or mill site so liable to be injured, or the right to take from such stream such additional quantity of water, as either may be deemed best for the interest of the state; provided the sum to be paid for such mill, mill site or privilege, shall in no case exceed two-thirds of the sum for which the commissioners shall have ascertained the hydraulic privileges, to be supplied by such additional quantity of water can be sold; or said commissioners may at their option, convey to any owners of any mill or mill site, so liable to be injured as aforesaid, a part of the water power

> to be created as aforesaid, as a compensation for the damages sustained by the taking such additional quantity of water from such streams."

Paragraph 18. The *sixteenth Act* was passed by the General Assembly on December 31, 1831, 30 O. L. 14, Volume 3, Chase's Statutes, page 1915, entitled "An Act to authorize the selection, location, sale and application of the proceeds of lands granted by Congress to aid the State of Ohio in extending the Miami Canal."

Section 1 of this Act authorizes the governor to cause to be selected and located as early as practicable the lands granted by Congress to aid Ohio in extending the Miami Canal.

Section 2 declares that the line of canal as then run and reported to the last General Assembly from Mad River at or near Dayton to Defiance at the mouth of the Auglaize River,

> "be and the same is hereby located and agreed upon as the route of said canal, and the person or persons authorized by the governor to make such selection or location shall be governed by such line,"

and the Act of Congress passed May 24, 1828, and the Act supplemental thereto, passed April 2, 1830. The Act then provides for the sale of such lands after due selection thereof as aforesaid.

Section 9 of the Act directs

> "that so soon as there shall be paid into the state treasury of the avails of said lands such sum as the commissioners of the canal fund may think sufficient to justify the commencement of the work within the provisions of the said grant, they shall notify the canal commissioners thereof, who shall proceed to put under contract such part of said

canal commencing at or near Dayton and extending north on the line referred to in this Act as the money then in the treasury for that purpose will justify; and they shall from time to time thereafter, as the avails of said lands may be paid into the treasury, expend the same in the extension of said canal until the whole of said avails shall be expended."

Paragraph 19. The *seventeenth Act* was passed February 13, 1832, Volume 3, Chase's Statutes, page 1917, entitled "An Act to amend the Act to provide for the internal improvement of the State of Ohio by navigable canals."

This Act authorized canal commissioners to enter upon and take possession of and use any lands, waters, streams and materials necessary for making repairs or for the improvement of the canals of the state, the feeders, dykes, locks, dams, bridges and other works connected therewith as they might think proper for making such repairs, and it provided that compensation should be made for the property thus taken in the same way as the original Act for construction passed February 4, 1825.

The Congress of the United States having granted lands in Ohio to the State of Indiana to aid in building the Wabash and Erie Canal, Indiana proposed to Ohio to transfer to Ohio such part of the land granted by Congress to Indiana as lay within Ohio if Ohio would build the Wabash and Erie Canal from the west Ohio state line to Lake Erie. Section 4 of the Act of Congress, passed May 24, 1828, 4 Statutes at Large, page 305, authorized Indiana to make such conveyance upon such terms as might be agreed upon by the two states. On

February 1, 1834, Indiana, through resolution of her General Assembly, conveyed to Ohio her right, title and interest to lands in Ohio which Indiana had received from Congress.

Paragraph 20. The *eighteenth Act*, in this case a resolution, was passed by the General Assembly of Ohio on February 24, 1834, accepting the conveyance of Ohio lands by the State of Indiana to the State of Ohio, thus giving to Ohio two hundred ninety-two thousand two hundred twenty-three (292,223) acres of land. This body of land and the grants made by Congress direct to Ohio made a total of one million two hundred thirty thousand five hundred twenty-one (1,230,521) acres of land to be sold for aid in construction of Ohio's canals.

Paragraph 21. The *nineteenth Act* was passed by the General Assembly of Ohio, February 27, 1834, 32 O. L. 213. It provided:

> "That all moneys arising from the sale of said lands or from grants or donations in aid of said work, together with the net proceeds of all tolls, fines and *water rents* derived from the canal north of Dayton shall be subject to the control of the commissioners of the canal fund as other canal funds are by law to be applied to the extension of said canal."

Paragraph 22. The *twentieth Act* was passed by the General Assembly March 3, 1834, 32 O. L. 308. By this Act the board of public works, then the successor to the board of canal commissioners, were to establish the line of the Wabash and Erie Canal from the east line of the State of Indiana to some suitable point for the termination of the same below the rapids of the Maumee River into Lake Erie. The Act directs the board of public

works to put the work under contract and carry it along from time to time as funds from the sale of lands should be received, or other moneys supplied. The work of construction of this canal began in 1837 and it was completed from Indiana's east line to Lake Erie in 1842.

Paragraph 23. The *twenty-first Act* was passed by the General Assembly of Ohio, March 8, 1836, 34 O. L. 331, entitled "An Act to provide for the extension and completion of the Miami Canal north of Dayton."

This Act gave authority for the purpose indicated by the above title and to borrow Two Hundred Thousand Dollars ($200,000.00) for each of the years 1836 to 1838, both inclusive, and Three Hundred Thousand Dollars ($300,000.00) in each of the years 1839 to 1841, inclusive.

Paragraph 24. The *twenty-second Act* was passed by the General Assembly, January 12, 1837, 35 O. L. 6, entitled "An Act appropriating money for the purchase of suitable lands for hydraulic purposes."

By this Act the General Assembly authorized an expenditure of the sum of Twenty-five Thousand Dollars ($25,000.00) and appropriated the same to be expended in purchasing suitable land along the Ohio canals where surplus water could be profitably used for hydraulic purposes.

Paragraph 25. The *twenty-third Act* was passed by the General Assembly April 3, 1837, 35 O. L. 114, and authorized and appropriated money for the same purposes as stated next above in developing hydraulic power not exceeding Six Thousand Dollars ($6,000.00) on the Ohio Canal, not exceeding Nine Thousand Dollars ($9,000.00) on the Miami Canal south, and not exceeding Five Thousand Dollars ($5,000.00) on the same canal

north of Dayton, in addition to the sums theretofore appropriated.

Paragraph 26. The *twenty-fourth Act* was passed by the General Assembly of Ohio March 19, 1838, 36 O. L. 85, Swan's Statutes of Ohio, 1841, pages 166 to 170, entitled "An Act relating to the management and sale of certain lands of the State of Ohio."

Section 13 of this Act provides for the purchase of land necessary to the proper use of any water power on the Miami Canal as follows:

> "That it shall be the duty of the acting commissioner on the Miami Canal to make selection of such lots of land as may be necessary to the proper use of any water power which may be created by the construction of said Miami Canal, and any works connected therewith, and any other lots which may be necessary to supply timber for the construction and repair of the canal; and shall furnish the register of the Lima land office with a list of all such selections before the sale of any of said lands, and such selections shall thereupon be by such register entered on record, and reserved from sale; and the state hereby reserves the right to make said canals through the lands sold under authority of this Act, clearing all claims for damages done to said lands."

Paragraph 27. The *twenty-fifth Act* was passed by the General Assembly March 23, 1840, 38 O. L. 87, Swan's Statutes of Ohio, 1841, pages 174 to 200, entitled "An Act to provide for the protection of the canals of the State of Ohio; the regulation of the navigation thereof and for the collection of tolls."

This Act makes very clear provisions for protection and management of the Ohio canals, including the Miami and Erie Canal, and in Section 18 thereof re-

enacts the prohibition against taking water from the canal without permission of the board of public works, as found in the Act of February 18, 1830, and it re-enacts Sections 3 to 7, inclusive, above quoted of that Act of February 18, 1830, but in this Act these sections become Sections 20 to 24, inclusive. The only change is that in this Act of March 23, 1840, the board of canal commissioners is designated as the "Board of Public Works."

The above mentioned sections 20 to 24, inclusive of said Act of March 23, 1840, read as follows:

> "20. Sect. XX. Whenever, in the opinion of board of public works, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, the said commissioners may order such surplus water, and any lands granted to, or purchased by the state, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rent, or otherwise, as they may deem most beneficial for the interests of the state.
>
> 21. Sect. XXI. The provisions of the foregoing section shall extend to and include the water passing round locks, from one level to another, on either of the canals of this state.
>
> 22. Sect. XXII. No hydraulic power, nor right to the use of any water, shall be sold, leased or conveyed, except such as shall accrue from the surplus water of the canal, feeders or dams, or from

the water passing round any lock, after supplying the full quantity necessary for the purposes of navigation.

23. Sect. XXIII. Every lease, grant or conveyance of water power, shall contain a reservation and condition, that the state, or its authorized agents, may, at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with, and injuriously affect the navigation of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns.

24. Sect. XXIV. All moneys received for the rent or sale of any hydraulic power, granted or conveyed under the provisions of this Act, shall be paid into the state treasury, and constitute a part of the canal fund; and shall be subject to the same rules and regulations as are prescribed in the sixth section of the Act to provide for the internal improvement of the State of Ohio, by navigable canals."

These Sections 20 to 24, inclusive, of the Act of March 23, 1840, here in question, afterwards without change became Sections 7775 to 7779 respectively, both inclusive, of the Revised Statutes of Ohio of 1880, and thereafter they became without change Sections 14,009 to 14,013 of the General Code of 1910. They remained without amendment or change until March 21, 1917, 107

O. L., page 418. In this last Act Section 14,009, General Code, was amended, limiting leases to twenty-five (25) years' duration. These Sections 14009 to 14013, inclusive, of the General Code are found in Volume 3 of Page's Annotated Ohio General Code, as amended in 107 O. L., page 418.

Many of the above old Acts are in a manner codified and a considerable part of the history of the canals is compiled in Swan's Statutes of Ohio 1841, pages 744 to 764, inclusive.

Paragraph 28. The *twenty-sixth Act* was passed by the General Assembly March 7, 1842, 40 O. L. 72. In Section 12 of this Act the board of public works was directed to select any and all canal lands belonging to the state as might be necessary to the use of water power created by the Wabash and Erie Canal or the Miami Canal or feeders or reservoirs and to select any other lots which might be necessary to supply timber for the construction and repair of the canals. Thus it will be seen through Acts already quoted that contemporaneously with the authorization of the construction of each of the three sections of the Miami and Erie Canal provision was made by the General Assembly for the acquirement of any lands necessary at any point on each of these three sections of this canal for the development of water power wherever such power might be developed and large appropriations were made in each case for that purpose.

Section 12 of the above mentioned Act, passed March 7, 1842, 40 O. L. 72, reads as follows:

> "Sec. 12. That it shall be the duty of the board of public works to make selection of such lots of land as may be necessary to the use of any water

power which may be created by the Wabash and Erie Canal, or the Miami Canal, or feeders, or reservoirs therewith connected, and any other lots which may be necessary to supply timber for the construction and repair of the canal, and to furnish the register of the proper land office a list of all such selections, before the day fixed for the sale of any such lands; and such selections shall, thereupon, be entered upon record by the register, and reserved from sale; and the state hereby reserves the right to make the canals through the lands sold, under the authority of this Act, clear of all claims for damages done to said lands."

Paragraph 29. The *twenty-seventh Act* was passed by the General Assembly on February 28, 1843, 41 O. L. 43. This Act provided for and directed the completion of the Miami Extension Canal in all of its parts from the Mad River at Dayton, Ohio, north to the Auglaize River and the City of Defiance, not then under contract, and this extension was completed in the year 1845.

Paragraph 30. The *twenty eighth Act* was passed by the General Assembly March 14, 1849, 47 O. L. 44, entitled:

"An Act in relation to the Miami Canal, the Miami Extension and the Wabash and Erie Canal."

We have already referred to this Act as being the Act which placed all three of these sections named in the above title under one name, the "Miami and Erie Canal."

LEASING OF THE ENTIRE PUBLIC WORKS OF THE STATE

Paragraph 31. Through an Act of the General Assembly passed May 8, 1861, 58 O. L. 117, entitled:

"An Act to provite for the leasing of the public works of the state,"

all such public works were leased for a period of ten years, the Act providing that the leases should be for that term of years from the day of the approval of the bond required by the Act. The public works of the state are named in this Act and they are as follows: Miami and Erie Canal, Ohio Canal, Walhonding Canal, Hocking Canal, Sandy and Beaver Canal, Muskingum Improvement and Western Reserve and Maumee Road, and all the side-cuts, feeders, reservoirs, lock-houses, collectors' offices, way-locks and leases of surplus water connected with the same or pertaining thereto and owned by the state for the purpose of being used in connection therewith, with the right to have additional surplus water; all moneys derived from the leasing of said public works to be paid into the treasury of the state.

A lease was executed to five men under this Act and put into effect. The public works were taken over by the lessees and operated for the period of ten years.

The Act of course provides all the details for the leasing, the terms of the lease, the duties and obligations both of the lessees and of the state under the lease.

Section 17 of the Act is as follows:

"Sec. 17. This Act shall take effect on its passage: Provided, that nothing in this Act shall preclude the state from granting permission to the City of Cincinnati to enter upon, and to improve as a public highway, and for sewerage purposes, all or any of that part of the Miami and Erie Canal which extends from the east side of Broadway, in said city, to the Ohio River, the state hereby reserving the right to make such grant."

On April 11, 1867, 64 O. L. 330, the General Assembly passed a joint resolution extending this lease of all public works for another period of ten years from and after June 1, 1871.

Two and one-half years before the end of the extension, the state took the public works back into its possession and no other leasing of the entire public works was ever made, but the state continued to operate them in the same manner as they had been operated prior to such leasing thereof.

ACTS OF THE GENERAL ASSEMBLY OF OHIO ABANDONING SECTIONS OF THE MIAMI AND ERIE CANAL

Paragraph 32. The first Act abandoning a portion of the Miami and Erie Canal was passed March 24, 1863, 60 O. L. 44. It is entitled and reads as follows:

> "An Act to authorize the City of Cincinnati to enter upon and occupy a part of the Miami and Erie Canal as a public highway and for sewerage purposes."
>
> "Section 1. Be it enacted by the General Assembly of the State of Ohio, that authority and permission shall be granted, in the manner hereinafter pointed out, to the City of Cincinnati, to enter upon, improve and occupy forever, as a public highway and for sewerage purposes, all or any of that part of the Miami and Erie Canal which extends from the east side of Broadway, in said city, to the Ohio River, including the width thereof, as owned or held by the state; but the said grant shall be made subject to all outstanding rights or claims, if any, with which it may conflict; provided, that no work shall be done by said city authorities on the premises hereby granted until the

plan of improvement shall be approved of by the board of public works.

Section 2. The said grant shall not extend to the revenues derived from the water privileges in said canal, which are hereby expressly reserved; and the said grant shall be made upon the further condition that the said city, in the use as aforesaid of all or any of said portion of said canal, shall not obstruct the flow of water through said canal, nor destroy nor injure the present supply of said water for milling purposes, and that said city shall be liable for all damages that may accrue from such obstruction or injury; but it is not intended hereby to relieve the lessees of said canal, or their assignees, from any responsibilities imposed upon them by 'an Act to provide for leasing the public works of the state,' passed May 8, 1861, or by the instrument of lease executed in pursuance of said Act, except as and to the extent that they may be interfered with, as said city may, from time to time enter upon, improve, and occupy any part of said grant.

Section 3. Whenever the council of said city, by a vote of not less than two-thirds of the whole number of members thereof, shall decide to use said canal as herein authorized, the said council shall make known its decision to the governor, and thereupon the governor, in behalf of the state, shall execute and deliver to the City of Cincinnati a grant of the part of said canal herein described for the uses and purposes before mentioned, and upon the terms and conditions specified in this Act. The attorney general shall prepare the form of said grant.

Section 4. This Act shall not be construed to confer upon said city any new power of taxation, or to borrow money, or to contract debts in the use as aforesaid of said canal.

Section 5. This Act shall take effect from and after its passage."

Paragraph 33. The second abandonment Act was passed March 26, 1864, 61 O. L. 74. It is entitled and reads as follows:

"An Act to authorize the City of Toledo to enter upon and occupy a part of the Miami and Erie Canal as a public highway, and for sewerage and water purposes."

"Section 1. Be it enacted by the General Assembly of the State of Ohio, that authority and permission shall be granted in the manner hereinafter pointed out, to the City of Toledo to enter upon, improve and occupy forever as a public highway and for the use of water pipes, and for sewerage purposes, all that part of the Miami and Erie Canal (known as the Manhattan branch), which extends from a point to be hereafter designated by the board of public works, at or near the southerly bank of Swan Creek, where the aqueduct crosses the said creek and continuing to the Maumee River, including the width thereof as owned and held by the state; but the said grant shall be made subject to all outstanding rights or claims, if any, with which it may conflict; provided, that all material composing the aqueduct, and the locks at the terminus of said canal, are hereby expressly reserved to the state, to be removed by her agents whenever the City of Toledo, by the authority of this grant, enters upon and occupies said canal.

Section 2. That the said city shall be liable for all damages that may accrue from the vacation of said canal; but it is not intended hereby to relieve the lessees of said canal, or their assigns, from any responsibilities imposed upon them by 'an Act to provide for the leasing of the public works of the state' passed May 8th, 1861, or by the instrument of lease executed in pursuance of said Act, except as and to the extent that they may be interfered with as said city may enter upon and occupy said grant.

Section 3. Whenever the city council of said

city, by a vote of not less than two-thirds of the whole number of members thereof, shall decide to use said canal as herein authorized, the said council shall make known the said decision to the governor, and deposit with him a written release executed by the lessees of the public works, relinquishing any rights they may have in that part of said canal, or a bond duly executed and to the satisfaction of the governor, indemnifying the state from all liabilities and damages which may result from said vacation, and thereupon the governor, in behalf of the state, shall execute and deliver to the City of Toledo a grant of that part of the canal herein described for the uses and purposes before mentioned, and upon the terms and conditions specified in this Act. The attorney general shall prepare the form of said grant, and also the form of said release or bond.

Section 4. This Act shall not be construed to confer upon said city any new sources of taxation or to borrow money, or to contract debts in the use as aforesaid of said canal.

Section 5. This Act shall take effect from and after its passage."

Paragraph 34. In Sections 44, 45, 46, 49 and 50, both inclusive, of Stipulation Exhibit No. 23 (Record 159) are listed other Acts of abandonment as indicated in those paragraphs aside from the two Acts of abandonment above quoted in full. We do not set out these abandonment Acts here as listed, as above stated, because, except as to the particular property abandoned by them respectively, they are in their respective terms and conditions of abandonment practically the same as the two abandonment Acts above quoted. The third and fourth abandonment Acts are listed at Sections 47 and 48, Stipulation Exhibit 23 (R. 159), and affect the Wa-

bash and Erie Canal (afterward Miami and Erie) in Paulding County.

Paragraph 35. The fifth abandonment Act was passed January 22, 1920, 108 O. L. Part 2, pages 1138 to 1141. It is entitled and reads as follows:

"(House Bill No. 560)

AN ACT

To abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to provide for the sale or lease of the same to the City of Toledo, Ohio.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be and the same is abandoned for both canal and hydraulic purposes, subject, however, to the rights hereinafter in Sections 6 and 7 provided for:

Commencing at the foot of the outlet lock of the Miami and Erie Canal in the City of Toledo, Lucas County, Ohio, being Lock No. 52, of said canal, numbering north from Loramie Summit, and extending thence westerly 1,200 feet, including the full width of the bed and banks thereof as defined by S. A. Buchanan's survey of said canal made under the direction of the state board of public works in the summer of 1909; also that portion of said Miami and Erie Canal commencing at the inner face of the southerly abutment of the old aqueduct over Swan Creek on the Manhattan branch of said Miami and Erie Canal, and extending thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, for a distance of 45,683 feet to a point just below the head of the Maumee side-cut, near Maumee, Ohio, excepting therefrom any portion of the same that may possibly be required in

the construction of any ship or barge canal, under authority of legislation passed or to be passed by the Congress of the United States, or by the State of Ohio.

Section 2. Within four months after the passage of this Act, the superintendent of public works shall cause such surveys to be made of said abandoned canal property as in his judgment is necessary for the carrying out of the provisions of this Act, together with such plats of the same as will facilitate the sale or leasing of said canal lands, which plats shall be preserved as permanent records in the office of the department of public works, at Columbus, Ohio.

Section 3. As soon as may be convenient, after the completion of the surveys and plats of the government engineers locating the line of said enlarged canal, and the report of the engineer having charge of such surveys has been filed with the secretary of war, showing what part of such canal, if any, will be required in the construction of the proposed enlarged canal, the governor shall appoint two disinterested freeholders, neither of whom shall be residents of Lucas County, but residents of the State of Ohio, who in conjunction with the superintendent of public works, shall proceed within thirty days after such appointments are made, to appraise the portion of said abandoned canal property that will not be required for the purposes of the proposed enlarged canal, as shown by the report of the government engineers relating thereto at its true value in money, and shall file in writing certified copies of such appraisement with the governor of the State of Ohio, and the mayor of the City of Toledo, Lucas County, Ohio, within thirty days after they have qualified as such appraisers by taking an oath of office.

Section 4. Said appraisers, other than the superintendent of public works, shall each be en-

titled to compensation at the rate of twenty-five dollars per day and necessary expenses for the time actually required in making such appraisement, all of which expenses shall be paid by the City of Toledo; one-half of the amount so paid shall be credited upon the purchase price to be paid the State of Ohio when a sale or lease to the said City of Toledo is completed. In case a vacancy occurs in such appraisal board, such vacancy shall be filled in the same manner in which the original appointments were made.

Section 5. The City of Toledo shall have the option of either leasing or purchasing the portion of said abandoned canal property not required for the construction of the proposed enlarged canal, appraisers herein arranged for, provided that the city council of said city shall, within three years after said appraisement has been filed with the governor and mayor, as herein provided, signifies by resolution of its council, its acceptance of such appraisement and its intention to either purchase or lease said abandoned canal property in accordance with the terms of this Act.

Section 6. In case the City of Toledo signifies its intention to purchase said property, the governor is hereby authorized, as soon as the purchase price for said canal property has been paid into the state treasury, to execute a deed conveying said property in fee simple to the City of Toledo, Lucas County, Ohio, but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing lease, which deed before delivery shall first be approved by the attorney general.

Section 7. In case the said City of Toledo, by resolution of its council, shall signify its preference for a lease of said canal property, the superintendent of public works, subject to the approval of the governor and attorney general, is hereby

authorized to execute and deliver to the said City of Toledo, a lease conveying to said city all the right, title and interest of the State of Ohio in and to said abandoned canal property, either in perpetuity or for a term of years, excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing leases, and in case the state's lessees are at any time, under the terms of this Act, deprived of their water privileges, the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which they are entitled, and in case the amount of compensation cannot mutually be agreed upon, the City of Toledo shall proceed under the provisions of the General Code, to condemn the rights of such lessees for the use of said municipality; provided, however, that no new leases shall be executed for either water or land rights upon any portion of the canal property described in Section 1 hereof during the three-year period referred to in Section 5 hereof; and provided further, that this Act shall not be construed as granting the lessees any rights in addition to those granted them in their existing leases.

Section 8. Prior to the execution of any deed or lease conveying to the said City of Toledo the lands herein described the City of Toledo shall enter into a contract with the State of Ohio, which contract shall be executed on the part of the State of Ohio by the governor and attorney general; that the said City of Toledo shall provide the right-of-way and construct a channel with suitable locks, to connect the Miami and Erie Canal with the Maumee River on such alignment, near Maumee City, as the superintendent of public works of the State of Ohio may designate, said connecting channel and locks to be completed within two years from the date of notification to said City of Toledo, by the superintendent of public works requesting that said improvements be

made, but such request shall not be made until the State of Ohio, its lessees or assigns, or the federal government of the United States, have arranged for the resumption of navigation in the existing canal upon a scale to justify the expenditure of the money required for making such connecting channel; the City of Toledo, however, shall construct all bulkheads or embankments necessary to cut off the flow of water at or near the southerly end of the canal herein abandoned, and likewise construct all overflow wasteweirs and necessary channels required to care for the surplus water that must be wasted at some point near the Maumee side-cut; all of which work must be done to the full satisfaction of the superintendent of public works, and in accordance with plans to be approved by him prior to the commencement of the work.

Section 9. In case a lease for the canal property herein abandoned is made to the City of Toledo, the annual rental therefor shall be at the rate of four per cent per annum upon the appraisement as fixed by the appraisers appointed by the governor, payable in semi-annual installments, on the first day of May and November of each and every year.

Carl R. Kimball,
Speaker of the House of Representatives;
Clarence J. Brown,
President of the Senate.

Passed January 22nd, 1920.
Approved February 4th, 1920.

James M. Cox, Governor.

Filed in the office of the secretary of state, at Columbus, Ohio, on the 4th day of February, A. D. 1920."

The above quoted Act is the Act construed by the United States Circuit Court of Appeals for the Sixth Circuit, in the case of The Maumee Valley Electric Com-

pany vs. The City of Toledo et al., 13 Federal Reporter, 2nd Series, pages 98 to 105.

Paragraph 36. The sixth abandonment Act was passed on March 25th, 1925, 111 O. L. 208, 214, entitled:

"An Act to abandon for canal purposes that portion of the Miami and Erie Canal between the Maumee River at Defiance, Defiance County, Ohio, and a point five hundred feet north of the Middletown Dam near the north corporation line of the City of Middletown, Ohio, and to provide for the leasing of certain portions of the same, to cities, villages and other political subdivisions of the state and for granting of leases outside of municipalities, etc."

Paragraph 37. The seventh abandonment Act was passed March 27, 1925, 111 O. L., pages 367 to 370. It is entitled and reads as follows:

"(Amended Senate Bill No. 148)

AN ACT

To abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to provide for the sale of the same to the county commissioners of Lucas County, Ohio.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be and the same is hereby abandoned for both canal and hydraulic purposes, subject, however, to the rights hereinafter in Sections 5 and 6 provided for:

Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, to a point where said canal joins with the Maumee River on the westerly side thereof in Providence

Township, Lucas County, Ohio, excepting therefrom any portion of any state lot now under an existing lease, and likewise excepting therefrom any portion of the same that may be required in the construction of any ship or barge canal, under authority of legislation passed or to be passed by the congress of the United States, or by the State of Ohio.

Section 2. Within four months after the passage of this Act, the governor shall appoint two disinterested freeholders neither of whom shall be residents of Lucas County, Ohio, but residents of the State of Ohio, who, in conjunction with the superintendent of public works, shall proceed within thirty days after such appointments are made to appraise the portion of said abandoned canal property at its true value in money, and to take into consideration in said appraisement the revenue that can be derived from the use of said canal for any purpose, and the amount fixed by two of said appraisers shall be the appraised value thereof, and shall file in writing certified copies of such appraisement with the governor of the State of Ohio and the county commissioners of Lucas County, Ohio, within thirty days after they have qualified as such appraisers by taking oath of office.

Section 3. Said appraisers, other than the superintendent of public works, shall each be entitled to compensation at the rate of twelve dollars per day and necessary expenses for the time actually required in making such appraisement, all of which expenses shall be paid by the county commissioners of Lucas County, Ohio; one-half of the amount so paid shall be credited upon the purchase price or rental to be paid the State of Ohio, when a sale or lease to said county commissioners of Lucas County, Ohio, is completed. In case a vacancy occurs in such appraisal, such vacancy shall be filled in the same manner in which the original appointments were made.

Section 4. The said county commissioners shall have the option of purchasing the portion of said abandoned canal property not required for the construction of the proposed enlarged canal, appraisers herein arranged for, provided that said county commissioners shall within two years after said appraisement has been filed with the governor and said board, as herein provided, signify by resolution of its board, its acceptance of such appraisement and its intention to purchase said abandoned canal property in accordance with the term of this Act.

Section 5. In case the board of county commissioners of the County of Lucas, Ohio, signifies its intention to purchase said property, the governor is hereby authorized, as soon as the purchase price for said canal property has been paid into the state treasury, to execute a deed conveying said property in fee simple to the board of county commissioners of Lucas County, Ohio, but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, including the rights of said owners to a renewal of their said existing leases and subject to all lawful claims for damages and compensation asserted by such lessees on account of the abandonment of said canal under the provisions of this Act including claims of lessees who are now receiving water at points situate on that part of said canal which has theretofore been sold and conveyed to the City of Toledo under and pursuant to the provisions of House Bill No. 560 enacted by the General Assembly of Ohio on the 22nd day of January, 1920, and said board of county commissioners of Lucas County, Ohio, shall hold safe and keep the State of Ohio free and harmless from said damage claims, which deed, before delivery, shall first be approved by the attorney general.

Section 6. In case the said board of county commissioners, by resolution of its board, shall signify its preference for a lease of said canal prop-

erty, the superintendent of public works, subject to the approval of the governor and attorney general, is hereby authorized to execute and deliver to the said county commissioners, a lease conveying to said county commissioners all the right, title and interest of the State of Ohio in and to said abandoned canal property, either in perpetuity or for a term of years, excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both including the rights of said owners to a renewal of their said existing leases and subject to all lawful claims for damages and compensation asserted by such lessees on account of the abandonment of said canal, as provided in Section 5 of this Act; provided, however, that no new leases shall be executed for either water or land rights upon any portion of the canal property described in Section 1 hereof, during the two years period refered to in Section 4 hereof.

All valid claims for damages and compensation as provided in Sections 5 and 6 and this Act shall be paid by the said board of county commissioners; and provided further, that this Act shall not be construed as granting the lessees any rights in addition to those granted them in their existing leases.

Section 7. In case a lease for the canal property herein abandoned is made to the county commissioners, the annual rental therefor shall be at the rate of four per cent per annum upon the appraisement as fixed by the appraisers appointed by the governor, payable in semi-annual installments, on the first day of May and November of each and every year.

Section 8. Provided that before the deed or lease of that part of said canal described in Section 1 of this Act shall be executed and before the county commissioners of Lucas County may avail themselves of the privileges of this Act, said county commissioners shall subsequent to the ap-

praisement provided in Section 2 of this Act, provide by resolution a time and place of hearing for the purpose of filing claims for damages and compensation by all owners of existing leases of canal lands or water or both and also the owners of the right under lawful renewals of such existing leases for the loss to be suffered by them by reason of such abandonment and the consequent extinguishment of the land and water privileges now enjoyed and hereafter to be enjoyed by them under and by virtue of their said leases including any renewals thereof.

Such hearing shall be fixed not exceeding six months from the time of filing such appraisement, and at least three months' notice thereof shall be served upon all of said state lessees in the same manner as provided by the law in the service of summons in civil cases. No claim for damages and compensation shall be allowed unless said claim or claims are duly filed with the said board of county commissioners prior to the time of such hearing.

If such claims are settled or adjudicated as hereinafter provided in a court of law, the court or county commissioners of Lucas County may then proceed to lease or buy that portion of the Miami and Erie Canal described in Section 1 hereof, in the manner provided by this Act. In order to adjudicate said damages and compensation to be paid for the rights under said leases, the board of county commissioners of Lucas County are hereby authorized and empowered to appropriate said rights by condemnation proceedings as provided by law in other cases. Upon the payment of the judgment in such cases and the compliance with the orders of the court, said county commissioners shall be vested with and succeed to all of the said rights of the owners of such leases.

Provided further that neither the passage of this Act nor any action that may be taken in pursuance thereof by the State of Ohio or any of its

officers, or by Lucas County, Ohio, or its county commissioners or other officers, shall have any effect on or be deemed or held to be a defense to any claims for damages or compensation by said lessees of the State of Ohio, secured to them under the terms of House Bill 560 passed by the General Assembly of Ohio, on January 20th, 1920, and found in Volume 108, Part 2, Ohio Laws, pages 1138 to 1141, inclusive.

Charles H. Lewis,
President of the Senate;
Harry D. Silver,
Speaker of the House of Representatives.

Passed March 27, 1925.

House of Representatives—Passed notwithstanding the objections of the governor—April 17, 1925.

Harry D. Silver
Speaker of the House of Representatives.

Senate—Passed notwithstanding the objections of the governor—April 17, 1925.

Charles H. Lewis,
President of the Senate.

Filed in the office of the secretary of state at Columbus, Ohio, on the 21st day of April, A. D. 1925.

Thad H. Brown,
Secretary of State."

This Act last quoted above covers and affects the same property which is covered and affected by the Act in question in this case. It is the same, practically, in its terms and provisions as the Act construed by the United States Circuit Court of Appeals in the above mentioned case of The Maumee Valley Electric Company vs. The City of Toledo, 13 Federal Reporter, 2nd Series, pages 98 to 105. The only real difference between the two Acts is as to the property covered and that in the Act passed

January 22, 1920, permission was given to the City of Toledo to buy the property covered by that Act, and in this Act just quoted above, permission was given to the Lucas County Commissioners to buy the property affected by this Act.

Paragraph 38. The eighth abandonment Act was passed April 21, 1927, 112 Ohio Laws, pages 388 to 390, entitled:

> "An Act to abandon for canal and hydraulic purposes that portion of the Miami and Erie Canal from a point five hundred feet north of the State Dam near the corporation line of the City of Middletown, Ohio, to the present terminus of said canal at St. Bernard, in the City of Cincinnati, Hamilton County, Ohio."

Paragraph 39. The ninth and last abandonment Act affecting Miami and Erie Canal is the Act in question in this case, passed May 11, 1927, 112 O. L., pages 360 to 363. It is entitled and reads as follows:

> "(Amended Senate Bill No. 48)
>
> AN ACT
>
> To abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all Acts in conflict therewith.
>
> Be it enacted by the General Assembly of the State of Ohio:
>
> Sec. 14178. Portion of Miami & Erie Canal abandoned; description:
>
> Section 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be, and the same is hereby abandoned for both canal and hydraulic purposes. Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof,

as defined by Buchanan's survey, to a point where said canal joins with the Maumee River on the westerly side thereof, in Providence Township, Lucas County, Ohio.

Sec. 14178-1. State of Ohio reserves title to all lands and waters.

Section 2. The State of Ohio reserves unto itself, the title to all lands and waters to which it it entitled under the various Acts, providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal, including all lands used for lock houses, waste ways or for other purposes and now the property of the State of Ohio.

Sec. 14178-2. Used and occupied lands to be held for the State of Ohio in fee simple.

Section 3. So much of said lands as were used and occupied by the Miami and Erie Canal shall be forever held for the State of Ohio in fee simple, and held by the state for the purpose of constructing upon the said lands, a highway, to be erected, constructed and improved at such time or times as the State of Ohio may hereafter, either by legislative enactment, or otherwise, find proper and convenient.

Sec. 14178-3. When existing leases shall become null and void.

Section 4. All leases heretofore granted to any person, firm or corporation, for canal or hydraulic purposes on that part of the Miami and Erie Canal described in Section 1 of this Act shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done.

Sec. 14178-4. Abandoned portion shall be under supervision and control of state highway director.

Section 5. The abandoned portion of said canal shall be under the supervision and control of the state highway director, to be devoted to highway

and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to, and he shall, within sixty days from the taking effect of this Act, drain the water of said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal.

Sec. 14178-5. Surveys and maps to be made.

Section 6. As soon as practicable, after this Act goes into effect, the director of highways of the State of Ohio shall cause surveys to be made of the canal property herein abandoned, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio, adjacent thereto, and file a copy thereof with the governor.

Sec. 14178-6. Making of plat or plan.

Section 7. The director of highways is further directed to make a plat or plan, showing the highway, its length, grades and width of so much of the canal property as may be used for such highway purposes, and all other lands adjacent thereto that may be leased for other purposes.

Sec. 14178-7. Use of lands before highway is constructed and improved.

Section 8. Until said highway shall be constructed and improved, no portion of the lands within the plat or plan showing such highway shall be leased for any purpose whatever, but until the State of Ohio shall construct and improve said lands for a highway, all municipal corporations through which said highway shall pass when completed, and the commissioners of Lucas County, Ohio, shall be permitted to use said canal lands for public purposes only, without compensation.

Sec. 14178-8. Leasing of adjacent lands; manner.

Section 9. All other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes may be

leased under the direction of the director of highways, in the following manner:

The said director of highways shall cause said lands, not to be used for said highways, to be appraised and a report of said appraisement filed in the office of the governor, and one copy left in the office of the director of highways.

After said lands are so appraised, and upon application therefor, the lands not needed or required within said highway may be leased to any applicant, for a period not to exceed fifteen years, and with the right of renewal for an additional fifteen years, upon a rental equal to six per cent per annum upon the value of the appraisement so made, and at the end of fifteen years, said lands shall be reappraised and likewise leased to such applicant.

Provided, however, that if any municipal corporation, Lucas County, township, or other taxing district desires to lease any portion of said lands not required for said highway purposes, the same shall be leased to such taxing district upon a rental of four per cent per annum.

Said application shall be made in writing, upon forms provided for that purpose, and shall clearly describe the lands covered in said application, and shall state the term of years for which such lease is desired, and shall be signed by a public officer, duly authorized by the public authorities of the city, village, or other political subdivision making said application, and when the same shall be desired by any political subdivision.

Before granting any lease to any private individual, notice of the filing of such application shall be given to the public officials of any municipal corporation, county, township, or other political subdivision in which said lands are located.

If, within thirty (30) days after such notice such officer of the political subdivision makes no application to lease said lands, the same may be leased to private persons, firms or corporations,

and such application made by such private persons, firm or corporation shall be made in writing upon forms provided for that purpose, describing the lands covered in the application, the term of years for which the lease is desired, and be signed by such person, firm or corporation, and filed in the office of the director of highways of the State of Ohio.

In the event that any leases granted herein are renewed at the expiration thereof, the same shall provide for a reappraisement by proper state authorities, upon the expiration of each fifteen-year period, and the rate of rental upon such new appraisement shall be made in the same manner as the original appraisement.

Sec. 14178-9. Right to remove bridges, to grade and construct roads and streets.

Section 10. The county commissionrs of Lucas County, the council or other legislative body of any municipality or township through which said abandoned canal passes, shall have, and are hereby granted, the right to remove existing bridges, crossing said abandoned portion of said canal over which county roads, city or village streets or township roads pass, and to grade and to construct such roads and streets across the channel of said abandoned portion by necessary fills and grades in the channel thereof and to such grade as shall be approved by the director of highways, and the county commissioners of Lucas County are authorized to drain the water of said abandoned portion, and to prevent the water from the river from flowing into or through said abandoned part of said canal, but reserving all rights of the State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadway, not in conflict therewith.

Sec. 14178-10. Sale prohibited; exception.

Section 11. No portion of the canal lands and lands adjacent thereto and herein abandoned shall

ever be sold, except by specific authority of the General Assembly of Ohio.

Sec. 14178-11. Defining term highway director.

Section 12. The term highway director, as used herein, shall be construed to mean any officer, commission, board or department that may be established by law for the control of public highways.

Sec. 14178-12. Repealing section.

Section 13. That all acts or parts of acts in conflict with this Act, be and the same are hereby repealed.

O. C. Gray,
Speaker of the House of Representatives.
Earl D. Bloom,
President of the Senate.

Passed April 4, 1927.

Senate—Passed notwithstanding the objections of the governor, May 10, 1927.

Earl D. Bloom,
President of the Senate.

House of Representatives—Passed, notwithstanding the objections of the governor, May 11, 1927.

O. C. Gray,
Speaker of the House of Representatives.

The sectional numbers on the margin hereof are designated as provided by law.

Edward C. Turner,
Attorney General.

Filed in the office of the secretary of state at Columbus, Ohio, on the 12th day of May, A. D. 1927.

Clarence J. Brown,
Secretary of State."

THE JAMES PURDY QUIT-CLAIM GRANT

Paragraph 40. A special joint resolution was passed by the General Assembly of Ohio on March 12, 1845, 43

O. L. 453, authorizing the settlement with James Purdy for lands taken from him by the State of Ohio on the south side of the Maumee River at the Village of Grand Rapids, Wood County, Ohio, and for water taken from him and used in operating his mill on that side of the river; the water to be taken by the state from the pool in the Maumee River above the dam and to be used in the operation of the Miami and Erie Canal on the north side of said river.

In pursuance of this resolution the James Purdy quit-claim grant was made to the State of Ohio and a copy thereof is Stipulation Exhibit No. 7, Record 101. (See Paragraphs 4 and 15 of the stipulation and agreement on the evidence, Record 60, 64.) A copy of said resolution is as follows:

"RESOLUTION

Relative to the Adjustment of the Claim of James Purdy.

Resolved, by the General Assembly of the State of Ohio, that the board of public works are authorized to negotiate and purchase of James Purdy, the right to which he may be entitled, as riparian proprietor, to the water which the state may want, flowing in the Miami River at the Grand Rapids, over and above what she may need for the purposes of the improvement of navigation by her public canals; and in case the said Purdy shall desire to receive the price agreed on, in whole or in part, in the surplus water of said river, the board shall construct a side-cut from the pool above the state dam sufficiently large for the purposes of navigation and to carry the water to the mills of said Purdy, with a suitable guard lock therein, which side-cut shall be under charge of the board of public works, and subject to reasonable tolls. And in fixing the price to be paid for the

water to be purchased, the benefit and saving to the said Purdy, and the increased value of his property by reason of the building and support by the state of the state dam and the said side-cut, over and above his condition before the said state dam was erected, shall be taken into consideration, and in payment of the price agreed on by said Purdy; and the board may sell to said Purdy, to be taken through such side-cut, so much water as shall be agreed on, so that there shall at all times remain to the state water enough for her purposes of navigation, and to supply the hydraulic power, which she shall have rented; and any balance due to said Purdy, by said agreement, shall be paid as damages to others are paid by existing laws for injuries occasioned by construction of the public works.

Resolved, Further, that in case the said board and said Purdy cannot agree as to the price to be paid to him, or upon the quantity and value of the water to be given therefor, on application in writing by said Purdy, the auditor, secretary and treasurer of state, or a majority of them, shall appoint three judicious, disinterested persons, who, after giving ten days' notice to said Purdy and to said board, by letter, through the public mail, or by personal notice, shall make appraisement of the value of his right in said water, and determine the value and quantity of water to be transferred to him therefor according to the provisions of the first resolution above, subject to the determination of the board as to the quantity of water actually to be transferred to said Purdy, so that any balance due him shall be paid as provided in the first resolution.

Resolved, that upon the agreement between the parties being consummated, either amicably or by appraisal, the said Purdy shall execute a conveyance in fee, in the same manner as by law deeds of lands are made, of his interest in the water so purchased of him, and the board shall execute to

him a lease or other conveyance in fee, of the quantity of water to be conveyed to him free of rent, in their usual form of lease or conveyance. And if the said Purdy shall suppose that he has a legal claim to compensation from the state for the obstruction of water from the river necessary for the purposes of navigation in her canal, the right to apply to the Supreme Court for the settlement of the question of the legality of such claim, in manner as is provided by resolution of this session for certain claimants on the Miami River, shall remain unimpaired to said Purdy.

John M. Gallagher,
Speaker of the House of Representatives;
David Chambers,
March 12, 1845. Speaker of the Senate."

ATTEMPT OF THE STATE OF OHIO TO REVIVE NAVIGATION ON MIAMI AND ERIE CANAL

Paragraph 41. On April 25, 1898, the General Assembly of Ohio passed an Act in an endeavor to revive navigation on the Miami and Erie Canal. That Act is entitled and reads as follows:

"(House Bill No. 901)

AN ACT

To promote better facilities to operate boats on the Miami and Erie Canals.

Whereas, it is due to the taxpayers of the State of Ohio to obtain from the canals and inland waterways under the control of said state the greatest amount of revenue compatible with their most efficient use, which can only be done by affording merchants, manufacturers and shippers more rapid and economical transportation thereon for their products; and

Whereas, as a motive power on land it has been demonstrated that electricity, because of its cheapness and practicability is eminently success-

ful, and it is believed that the same results can be accomplished on water and that efforts to that end should be specially made, provided the same is done without any expense to the state; therefore,

Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That the board of public works of this state be and is hereby authorized and empowered to grant by lease or permit to any party or parties or company the right to make any experiment with electricity as a motive power for the propulsion of boats or other craft on the Miami and Erie Canal by poles and overhead wires erected for such purpose, or by traction power on the berme banks or towing baths in such manner and under such regulations as said board of public works may direct, provided that animal or other motive power for the propulsion of boats as used at present is not to be in any manner interfered with. And, if such experiments with electricity when made should be found successful, said board may further grant by lease or license to such party or company, the right to operate and propel boats and other craft on said Miami and Erie Canal as aforesaid under the following regulations:

Section 2. Any party or company to whom a grant or license as provided for in Section 1, is made, may operate its own boats, but it shall be obligated to propel and operate all boats for hire when the owner may so desire, under and pursuant to such reasonable rules as to tonnage per mile or otherwise as the board of public works may fix if the parties are unable to agree.

Section 3. In any experiments made as aforesaid, or any act done in developing the practical application of electricity as a motive power, no expense shall be incurred by the state or the board of public works, and no contract for same shall be in force and effect until approved by the governor and attorney general.

Section 4. This Act shall take effect and be in force from and after its passage.

Harry C. Mason,
Speaker of the House of Representatives.
Asahel W. Jones,
President of the Senate.
Passed April 25, 1898. 2636"

Paragraph 42. On April 9, 1902, the General Assembly of the State of Ohio passed an Act in another endeavor to revive navigation on the canals of Ohio, but therein expressly authorized and ordered the board of public works to revise and readjust as to rentals all water-rate contracts then in existence on the Miami and Erie Canal and the northern division of the Ohio Canal. That Act is entitled and reads as follows:

"(House Bill No. 426)

AN ACT

To provide for the retention, maintenance and supervision of the canals of Ohio, their water supplies, reservoirs, dams, feeders and adjacent lands; to encourage the building of canal boats and the extension of cheap transportation.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That it is hereby declared as the settled policy of this state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo shall be retained and maintained as a public canal; also that the same policy is hereby declared as to the northern division of the Ohio Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cleveland to Dresden on the Muskingum River.

Section 2. That all boats hereafter built for use upon either of said lines of canal for freight trans-

portation shall be paid for by the state at their then true value in money if, at any time in the future, the policy of the state shall be changed by abandonment of either or both of said lines of canal so as to make such boats useless for transportation purposes.

Section 3. It is hereby declared as the settled policy of this state that the water supplies, reservoirs, dams, feeders and adjacent lands thereto of the southern division of the Ohio Canal from Dresden Junction to Lockbourne, and from Columbus to Portsmouth shall be retained and maintained. That within sixty (60) days after the passage of this Act, the governor of the state shall appoint a non-partisan commission consisting of two members, who, together with the state engineer, shall constitute a board of commissioners. The board of commissioners when appointed shall, with the assistance of a stenographer, which it is hereby authorized to employ to take all necessary testimony, proceed to investigate fully the condition of the southern division of the Ohio Canal, and all the facts bearing upon the question of its improvement, maintenance, its present and future usefulness as a canal, together with all possible information bearing upon this subject, and report the same, together with recommendations, to the next General Assembly, pending which report the same shall be kept open for navigation.

Section 4. The said board of commissioners, together with the board of public works, shall within the present year investigate all present water-rate contracts on the two lines of canal mentioned in Section 1, and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future.

The board of commissioners and the board of public works shall also investigate the water rent contracts upon the lines of the canal mentioned in Section 3, and make a special report to the next

General Assembly as to what extent the rates for water rent may be increased.

Section 5. The members of the board of commissioners, other than the said engineer, shall each receive as compensation for their services under this Act, the sum of $10.00 per day, provided the time employed in the performance of said duties shall not exceed ninety days, unless such time be extended on the certificate of the governor filed in the office of the auditor of state. Said members shall also be entitled to receive their actual expenses incurred while in the performance of their duties, and such reasonable compensation for the services of a stenographer as the board of commissioners may allow, and shall be paid by warrant on the treasurer of state, upon vouchers being filed in the office of the auditor of state and approved by the state engineer.

Section 6. This Act shall be in force from and after its passage.

W. S. McKinnon,
Speaker of the House of Representatives.
Carl L. Nippert,
President of the Senate.
980

Passed April 9, 1902."

Paragraph 43. On May 8, 1861, the General Assembly passed an Act providing for the leasing of the public works of the state. The title and Sections 1 and 11 of that Act are as follows:

"AN ACT

To provide for leasing the public works of the state.

Be it enacted by the General Assembly of the State of Ohio, as follows:

Section 1. That the governor, auditor, and treasurer of state be and they are hereby authorized and required, as hereinafter provided, to

lease, for the term of ten years, from the day of the approval of the bond herein required, the public works of the state, consisting of the Miami and Erie Canal, Ohio Canal, Walhonding Canal, Hocking Canal, Sandy and Beaver Canal, Muskingum Improvement, and Western Reserve and Maumee Road, and all the side-cuts, feeders, reservoirs, lockhouses, collectors' offices, weigh-locks, and leases of surplus water connected with the same or appertaining thereto, and owned by the state, for the purpose of being used in connection therewith, with the right to have additional surplus water; and all moneys derived from the leasing of said public works shall be paid into the treasury of the state.

Section 11. Whenever in the opinion of the lessee or lessees of any of the water power on said canals or slack water improvement, the said lessee or lessees of the public works do not supply him or them with the surplus water, as provided in their water leases, according to the true intent and meaning of the same, the said lessee or lessees of the water power may make complaint in writing to the board of public works, who shall examine into the truth of said complaint, and if the same be, in their opinion, well founded, the member of said board in whose division the said water power is located, shall forthwith notify the lessee or lessees of the said public works of the nature of the injury complained of, and the said lessee or lessees of said public works shall without any unnecessary delay correct the same, and in default thereof for the injuries sustained by them, the said lessee or lessees of water power may then have and maintain an action directly against said lessee or lessees of said public works, their sureties or their assignees, for the amount of such damage or injury sustained; and the said lessee or lessees of said public works shall have the same right as the state now has, when the water leases

are forfeited for non-payment of rent or other cause, or expire, to re-enter and lease again with the consent of the board of public works, in writing, said water privileges for such period of time not exceeding the unexpired part of said ten years' time."

ADDENDUM

In our hurry in preparation of this brief, because of the advancement of the case for hearing, we missed our notes for discussion of the stated point of appellants' claiming that the state is bound to allow the water to follow the natural channel of the Maumee River since the passage of the Act attacked in the cause.

Section 8 of the Act of February 4, 1825 (2 Chase, p. 1472, Appendix, page 200), gave the state power to enter upon, take possession of and use not only lands but *waters*, *streams* and materials as well, necessary for the construction and operation of the canal.

All lands and waters thus acquired were acquired in fee simple under the express terms of Section 8 of the Act of 1825.

Malone vs. Toledo, 34 O. S. 541, 546, 547.

All parties interested in the waters must at this date be held to have been paid therefor or to have waived all rights thereto.

Malone vs. Toledo, *supra*, 549.

Cooper vs. Williams, 4 O. Rep. 287.

In acquiring the waters the state was not expressly prohibited from using them for purposes other than navigation in the canal and the specific purpose for which they were acquired operates as a limitation of *quantity* and not of character of *use*.

State vs. Middletown Hydraulic Co., 114 O. S. 438, 457, 458.

U. G. Denman,
Karl E. Burr,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 674.—October Term, 1928.

Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, etc., et al., Appellants,

vs.

The Maumee Valley Electric Company.

Appeal from the District Court of the United States for the Southern District of Ohio.

[June 3, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

This is a direct appeal under § 266 of the Judicial Code from a final decree, following an interlocutory decree, of a district court of three judges for southern Ohio, — F. (2d) —. The decree enjoined appellants, the Superintendent of Public Works of Ohio, a state officer, the City of Toledo, certain villages in Ohio, and the Board of County Commissioners of Lucas County, Ohio, from draining or otherwise interfering with the flow of water in a section of the Miami & Erie Canal in such manner as to interfere with rights of appellee to take surplus water from the canal under certain leases and a grant acquired by it or its assignors from the state. Appellee contends that the Act of the Ohio legislature of May 11, 1927, under which appellants purport to act, is in violation of the Federal Constitution.

The section of the canal in question extends from a point on the Maumee River northeasterly along the river to Toledo and thence to Lake Erie. The water from the river enters this section of the canal at its western end and flows past the Providence Mills involved in No. 675, *Kirk* v. *Providence Mill Co., infra*, p. —. Some sixteen miles from the inlet is a side-cut through which water may be discharged into the river and so diverted from the rest of the canal. The section from the inlet to this side-cut is described as

Lineal Part 2. Appellee's plant is located on Lineal Part 1 which extends from the side-cut northeasterly to the outlet at Toledo, and is thus dependent for its supply of water on a continuous flow through Lineal Part 2.

The several leases were granted by the state, acting through its Board of Public Works, in 1895, 1901, two in 1903, and 1906. Each for a specified consideration or a stipulated rental, purported to grant for a period of thirty years, with privilege of renewal, the right to take from the canal specified amounts of water for hydraulic purposes. In 1910 the lease of 1895 was supplemented and amended to provide for an increased amount of water. For present purposes, we may assume that all rights under these leases are vested in appellee and that each has been from time to time properly renewed at the expiration of its term.

The canal in question and the waters passing through it are the property of the state and all the leases were granted under the provisions of the Act of March 23, 1840, 38 Ohio Laws, 87, authorizing, upon specified terms, disposition for hydraulic purposes of the surplus waters of the canals of the state not required for navigation. By § 22 of that act it was provided that no right to use the waters should be disposed of "except such as shall accrue from the surplus water of the canal . . . after supplying the full quantity necessary for the purposes of navigation" and by § 23 it was enacted that the leases should contain, as did the present leases in substance, a stipulation that the state or its authorized agents "may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation . . ."

Following the acquisition of its first lease in 1900, appellee constructed a small hydraulic electric plant on land adjacent to Lineal Part 1. In 1910, appellee, having secured three of the other leases, reconstructed its plant and, pursuant to an agreement with the state, improved the canal at large expense and is now using the water from it in the business of generating and selling electric light and power.

By Act of May 11, 1927, 112 Ohio Laws, 360-363, §§ 14178 to 14178-12 of General Code of Ohio, it was directed that that portion

of the Miami & Erie Canal known here as Lineal Part 2 be abandoned for both canal and hydraulic purposes and held by the state for the purpose of constructing a highway upon lands occupied by the canal. It transferred the abandoned part to the supervision and control of the State Highway Director and directed him within sixty days after the Act should take effect, to drain the water from the abandoned part of the canal and to prevent water from flowing into or through that part. Section 4, provided that all leases previously granted for canal or hydraulic purposes on the part of the canal referred to "shall become and be null and void on and after sixty days from the taking effect of this Act." Since Lineal Part 1, from which appellee withdraws water from the canal under its several leases, is fed only by the water flowing from Lineal Part 2, compliance with the statute will also result in draining the water from Lineal Part 1 of the canal and will deprive appellee of the use of the water which it has been withdrawing under its leases. Appellee asserts, as the district court held, that the effect of the Act of 1927 is to impair the obligation of the contracts embodied in its leases in violation of § 10, Art. I, and to deprive it of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

By Act of January 22, 1920, 108 Ohio Laws, Part 2, 1138, the Ohio Legislature had declared that Lineal Part 1 of the canal should be abandoned. By the same act, purchase of this section by the City of Toledo was authorized, subject to the rights of owners of existing leases. It was provided that if the city should deprive the lessees of "their water privileges" the city should pay them "a fair compensation for the loss of the water to which they are entitled"[1] and the conveyance to the city should so provide. Under this statute Lineal Part 1 was sold and conveyed to the city. Upon the adoption of a resolution by the city council directing that the water be shut off from Lineal Part 1, and upon refusal of the city to pay appellee for the deprivation of its use of the water, appellee brought suit in the Western Division of the Northern District of Ohio for an injunction restraining the city from

[1]Similar legislation authorizing the purchase of Lineal Part 2 by the county commissioners of Lucas County was enacted March 27, 1925, 111 O. L. 367. The option to purchase has not been exercised.

cutting off the water. A decree of that court denying an injunction was reversed by the Court of Appeals for the Sixth Circuit. *Maumee Valley Electric Co.* v. *City of Toledo*, 13 F. [2d] 98. That court declined to pass upon the power and right of the state to abandon the canal and cut off the water from the lessees, but held that the city had entered into a contract with the state for the benefit of appellee to permit the water to flow through the canal unless compensation was paid. The bill of complaint in the present suit sets up the contract with the city and the decree in the suit in the northern district, but that decree is not before us for review. It does not appear that the city threatens to violate the decree or that there are any circumstances entitling appellee to any further relief against it upon the contract for its benefit, or that the state through its legislation and conveyance of Lineal Part 1 to the City of Toledo intended to surrender or has surrendered any of its rights in or powers over Lineal Part 2, or has subjected itself to any new or additional obligation to maintain the canal or continue the flow of water through it.

The present suit, therefore, must turn upon the nature and extent of the right to withdraw water from the canal which appellee acquired under the grant and its several leases. To establish that its constitutional rights are infringed, it must show that compliance with the Act of 1927 is inconsistent with and infringes the rights conferred upon it by them. They are public grants by the state, to be construed in the light of the statute of 1840 authorizing them, and the other laws of the state. What the state has granted it may not take away, but the exercise of powers reserved to it under the grant cannot infringe either the contract or due process clauses of the Constitution.

The section of the canal now in question was originally constructed and operated by the state as a part of a larger canal system for purposes of navigation. By Act of February 23, 1820, 18 Ohio Laws 147, commissioners were appointed to locate a canal between Lake Erie and the Ohio River. The canal was constructed under the Act of February 4, 1825, 23 Ohio Laws 50, which created a board of canal commissioners and empowered them to construct a navigable canal, including the section presently involved, to take and use the waters of the state for that purpose, to establish reasonable tolls for the use of that canal and to provide for their col-

lection. Provision was first made for the use of the surplus waters of the canal for hydraulic power by Act of February 18, 1830, 28 Ohio Laws 58, which was superseded by the Act of March 23, 1840, 38 Ohio Laws 87, under which the present leases were granted.

The paramount object of the state in constructing the canal was to effect navigable communication between Lake Erie and the Ohio River. See *State* v. *Railway Company*, 37 Ohio St. 157. The use of the water for hydraulic purposes was only incidental and subordinate to the declared purpose of the state to promote navigation and was expressly made so by the Leasing Act of 1840, which limited all leases to the use of surplus water not required for purposes of navigation and provided for their abrogation whenever the use of the water for hydraulic purposes interfered with navigation. Leases of surplus water, granted under the Act of 1840 and similar in terms to those involved in the present litigation, have been repeatedly construed by the highest court of the State of Ohio, which has uniformly held that they were only incidental to the use and maintenance of the canal for purposes of navigation; that they imposed no obligation on the state to maintain the canal either for navigation or other purposes and when abandoned by the state the right of lessees to surplus water ceased. *Hubbard* v. *City of Toledo* [1871], 21 Ohio St. 379; *Elevator Co.* v. *Cincinnati* [1876], 30 Ohio St. 629; *Fox* v. *Cincinnati* [1878], 33 Ohio St. 492; *Vought* v. *Railroad Co.* [1898], 58 Ohio St. 123, 161. In *Fox* v. *Cincinnati*, *supra*, it was held that a lease of surplus waters in the Miami & Erie Canal under the Act of 1840 was subject to the power of the state to abandon the *locus quo* for purposes of navigation and to convert it into a city highway. On writ of error, this Court affirmed the judgment of the state court, 104 U. S. 783, saying by Chief Justice Waite [p. 785]:

"The use of the water for hydraulic purposes is but an incident to the principal object for which the canal was built; to wit, navigation. The large expenditures of the State were to furnish, not water-power, but a navigable highway for the transportation of persons and property. The authority of the board of public works to contract in respect to power was expressly confined to such water as remained after the wants of navigation had been supplied; and it never could have been intended in this way to impose on the State an obligation to keep up the canal, no matter

what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the State to maintain the canal for navigation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether."

The court below, recognizing that such had been the established construction of surplus water leases, thought nevertheless that as at the time of appellee's first lease, 1895, navigation on the canal had very much diminished and at the time of the later leases had ceased, the state, by continuing to grant leases of surplus water under the Act of 1840 must be taken to have abandoned the use of the canal for navigation and to have made use of it only as a source of water for sale for hydraulic purposes. Hence it concluded that the leases could no longer be construed as were the earlier leases by this and the state court, but that they must be taken as grants of the right to use the water without any power reserved in the state to abandon the canal or to devote it to other uses.

Even if it be assumed that there was a complete non-use by the public of the canal for purposes of navigation as early as 1895, which seems to be in dispute, neither the court below nor the appellee points to any act or omission on the part of the state indicating abandonment of the canal by it as an instrument of navigation before the act of the Legislature of 1927, or any act devoting it to other purposes, other than the making of leases or grants which, as before, purported to deal only with surplus waters not required for navigation. Instead, reliance is placed on the fact that there had been a gradual abandonment of the use of the canal for navigation by the public.

If, under the local law, the state might abandon the canal, while still used for navigation, by appropriate legislative action and by such abandonment terminate the rights of lessees under the Act of 1840, which appellee does not deny, it is difficult to see how the failure of the public to use the canal and the continued practice of granting leases of surplus waters by administrative officials under the Act of 1840, which the courts of Ohio had repeatedly held were subject to the power of the state to abandon the canal, evidenced a change of state policy or forfeited the right which had

resided in it from the beginning to abandon the canal and devote it to other purposes.

The power to abandon the canal as an instrument of navigation resided in the state legislature and has been exercised from time to time with respect to designated sections.[2] That it had not, before the Act of 1927, abandoned the section of the canal now in question as such an instrumentality appears from the Act of the Legislature of April 25, 1898, 93 Ohio Laws 370, authorizing the board of public works to grant leases or licenses to persons or corporations to operate boats in the canal by electric power and requiring them to propel the boats of others for hire and by the Act of April 9, 1902, 95 Ohio Laws 118, declaring it to be the settled policy of the state to maintain the Miami & Erie Canal as a public canal and providing that boats built for use upon it for freight transportation should be purchased by the state at their fair value if, in the future, the policy of the state should be changed by abandonment of the canal so as to make the boats useless for transportation.

These statutes exhibit a continuing purpose of the legislature to stimulate and encourage the use of the canal for purposes of navigation for which it was established. The fact that such stimulation was found necessary or desirable and that it ultimately failed of its object, does not indicate, in event of failure, a purpose on the part of the state to relinquish its power to abandon the canal and devote it to other purposes unhindered by the leases of surplus waters.

We find in this case no circumstances differentiating it from the earlier decisions in this and the Ohio courts. In each, as in the present case, the failure of the public to make sufficient use of a particular sector for transportation led to its abandonment and appropriation to other purposes and to the necessary termination of all rights under grants of surplus water which, being but incidents to the maintenance of the canal for naviga-

[2] Act of March 24, 1863, 60 O. L. 44 (involved in Fox v. Cincinnati, supra); Act of March 26, 1864, 61 O. L. 74; Act of April 12, 1888, 85 O. L. 207; Act of March 3, 1891, 88 O. L. 72; Act of January 22, 1920, 108 O. L. Part 2, 1158; Act of March 25, 1925, 111 O. L. 208; Act of March 27, 1925, 111 O. L. 367; Act of April 21, 1927, 112 O. L. 388; Act of May 11, 1927, 112 O. L. 360.

tion, ceased when that purpose was abandoned. The fact that some of the earlier cases involved other state canals on which there was still some navigation at the time of the granting of the leases there involved, and the additional fact that the present appellee under its supplemental agreement with the state bears the expense of maintaining and patroling the canal, we do not regard as sufficient to differentiate this case from those so long acquiesced in. Nor can the case of *State ex rel. Crabbe* v. *Middletown Hydraulic Co.*, 114 Ohio St. 437, be taken to have overruled, *sub silentio*, the rule announced in the former cases which was not involved in its decision.

The grant was of water to be taken from the river near the entrance to the canal. Appellee admits that of itself the grant imposed no obligation on the state to continue the canal in use. The only claim made by appellee under this grant is of the right to have the specified amount of water come to it through the canal so long as it is maintained as such. Consequently, appellee has no right under this grant, apart from the right claimed under its leases, to have the state maintain the canal, which latter we find to be non-existent, and we need not decide what effect in other respects, if any, the Act of 1927 had upon the grant.

The decree below will be reversed, but the decree to be entered will be without prejudice to the rights of appellee against the City of Toledo under the Ohio statute of January 22, 1920, and under the conveyance to the City of Toledo made pursuant to it, and without prejudice to the rights of appellee under the final decree of the District Court for Northern Ohio, entered on the mandate of the Court of Appeals for the Sixth Circuit in the suit entitled *Maumee Valley Electric Company* v. *The City of Toledo, et al.*

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.